(24,693)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 949.

CENTRAL TRUST COMPANY OF ILLINOIS AND THE COVINGTON SAVINGS BANK AND TRUST COMPANY, AS TRUSTEE OF THE I. RHEINSTROM & SONS COMPANY, BANKRUPT, APPELLANTS,

vs.

GEORGE LUEDERS & CO., G. S. NICHOLAS & CO., D. A. WHITE CO., THE E. BERGHAUSEN CHEMICAL CO., THE E. A. CONKLING BOX CO., T. A. DECKER, B. F. GOODRICH CO., AND HAZEL-ATLAS GLASS CO.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MAY 11, 1915.

IN THE

United States Circuit Court of Appeals

SIXTH CIRCUIT.

No. .....

IN RE THE I. RHEINSTROM & SONS COMPANY,
Bankruptcy.

Appeal from the District Court of the United States for the Eastern District of Kentucky, Sitting at Covington, Kentucky, to the United States Circuit Court of Appeals for the Sixth Circuit.

TRANSCRIPT OF RECORD.

HARMON, COLSTON, GOLDSMITH & HOADLEY,
Cincinnati, Ohio,
Attorneys for Appellant, The Covington Savings Bank & Trust Company, Trustee.

LESSING ROSENTHAL,
CHARLES H. HAMILL,
LEO F. WORMSER,
Chicago, Ill.,
Attorneys for Appellant, Central Trust Company of Illinois.

DECAMP & SUTPHIN,
Cincinnati, Ohio.
BURCH, PETERS & CONNELLY,
Cincinnati, O.
Attorneys for Appellees.

THE TOLEDO BRIEF & RECORD COMPANY,
PRINTERS.

Transcript of Record.

PROOF OF DEBT DUE CORPORATION.

(Filed May 6, 1912.)

At New York in the Southern District of New York on the 2nd day of May, A. D., 1912, came Ferdinand Weber of New York in the County of New York and State of New York and made oath and says that he is Treasurer of the George Lueders & Company, a corporation incorporated by and under the laws of the State of New York and carrying on business at New York in the County of New York and State of New York and that he is duly authorized to make this proof and says that the said, the I. Rheinstrom Sons Company, the person against whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of said petition and still is justly and truly indebted to said corporation in the sum of Fifteen Hundred and Sixty-Nine and Thirty Three Hundredths ($1569.33) Dollars. That the consideration of said debt is as follows: materials and supplies sold to said bankrupt for the purpose of carrying on the said bankrupt's business; that no part of said debt has been paid; that there are no set-offs or counter-claims to the same; that the only securities held by this deponent for said debt are the following: Three (3) promissory notes dated February 14, 1911, of Isaac Rheinstrom, Robert L. Rheinstrom and Walter L. Bodman, for $392.44, $392.33 and $392.34 maturing eighteen (18) months—twenty-four (24) months and thirty (30) months after date respectively, and said deponent has a lien upon all of the property and effects of said bankrupt as may have been involved in its business and all the accessories connected therewith including the interest of such company in the real estate used in carrying on said business, as provided for by Section 2487 of the Statutes of the State of Kentucky.

Ferdinand Weber,
Treas.

Sworn to before me and subscribed in my presence this second day of May, A. D., 1912.

(Seal) Chas. T. Fish,
Notary Public in and for said County and State.

Proof of Debt Due Corporation.

To Walter A. DeCamp and Dudley V. Sutphin.

I, Ferdinand Weber, of New York in the county of New York, and State of New York do hereby authorize you, or any one of you, to attend the meeting or meetings of creditors of the bankrupt aforesaid at a court of bankruptcy, wherever advertised or directed to be holden, on the day and at the hour appointed and notified by said court in said matter, or at such other place and time as may be appointed by the court for holding such meeting or meetings, or at which such meeting or meetings, or any adjournment or adjournments thereof may be held, and then and there from time to time, and as often as there may be occasion, for me and in my name to vote for or against any proposal or resolution that may be then submitted under the acts of Congress relating to Bankruptcy; and in the choice of trustee or trustees of the estate of the said bankrupt, and for me to assent to such appointment of trustee; and with like powers to attend and vote at any other meeting or meetings of creditors, or sitting or sittings of the court, which may be held therein for any of the purposes aforesaid; also to accept any composition proposed by said bankrupt in satisfaction of his debts, and to receive payment of dividends and of money due me under any composition, and for any other purpose in my interest whatsoever, with full power of substitution.

In Witness Whereof, I have hereunto signed my name and affixed my seal the 2nd day of May, A. D., 1912.

Ferdinand Weber,
Treas.

Signed, sealed and delivered in presence of
Chas. T. Fish.

Acknowledged before me this 2nd day of May, A. D., 1912.

(Seal) Chas. T. Fish,
Notary Public in and for said County and State.

The State of New York, County of New York, ss.

Ferdinand Weber being first duly sworn, says that he is Treasurer of the George Lueders & Company, and that he is duly authorized to execute the foregoing power of attorney.

Ferdinand Weber,
Treas.

Sworn to and subscribed before me this 2nd day of May, A. D., 1912.

(Seal) Chas. T. Fish,
Notary Public in and for said County and State.

THE I. RHEINSTROM & SONS CO.

To.

George Lueders & Co. Dr.

					Marask Water.	Other Goods
1910.						
October	3, To Mdse.					35
	1 " a	318 gal.	—92½		294.15	
	11 a	64½	—92½		59.66	
	18 a	770	—92½		712.25	
December	12 a	378	—92½		349.65	
	" a	190	—92½		175.75	
	20 a	239	—92½		221.08	
	24 a	96	—92½		88.80	
	29 a	48	—92½		44.40	
	30 a	92	—92½		85.10	
11 Jan.	6 a					120.
	18 a	422	—92½		390.35	
		2617½ gals.	"		2421.19	155
returned		1088½ gals.	92½		1006.86	
	MARASK WATER				1414.33	
	OTHER GOODS				155.	
	TOTAL OF CLAIM				$1569.33	

PROOF OF CLAIM OF D. A. WHITE CO.

(Filed May 8, 1912.)

State of Ohio, County of Hamilton, ss:

At Cincinnati in the Southern District of Ohio, on the Ninth day of March 1912, came P. J. Schneider of Cincinnati in the County of Hamilton and State of Ohio and made oath and says:

(3) That he is treasurer of The D. A. White Co. a corporation incorporated by and under the Laws of the State of Ohio and carrying on business at Cincinnati, in the County of Hamilton and State of Ohio and that he is duly authorized to make this proof;

(4) That the above named bankrupt, the person The I. Rheinstrom & Sons Co. whom a petition for adjudication of bankruptcy has been filed, was, at and before the filing of said petition and still is, justly and truly indebted to said The D. A. White Company (Name of Creditor) in the sum of Nintey-one Hundred Twenty-one and 02-100 dollars ($9121.02);

(5) That the consideration of said debt is as follows: (Merchandise as per itemized statement attached hereto and made part hereof) 4 (promissory notes, originals of which are filed herewith and made part hereof;)

(5a) That no note has been received nor judgment recovered therefor (except) the attached.

(6) That no part of said debt has been paid.

(7) That there are no-set offs or counter claims to the same.

(8) That said creditor has not, nor has any person by order of said creditor, or to the knowledge or belief of said deponent for the use of said creditor, received any manner of security for said debt whatever.

(9) This claimant claims a lien upon so much of the property and effects of The I. Rheinstrom & Sons Company as may have been involved in its business and all of the accessories connected therewith including the interest of such company in the real estate used in carrying on such business, having furnished materials and supplies for the carrying on of such business under Sections 2487 to 2499 of the Kentucky Statutes.

[X] R. J. Schneider.

Subscribed and sworn to before me this 9th day of March A. D. 1912.

(Notary Seal.) W. A. Earls,
(Seal)
Notary Public, Hamilton County, Ohio.
My commission expires April 19, 1914.

POWER OF ATTORNEY

To Reeve, Burch, Peters & Oppenheimer and Paul V. Connolly

(10) You or either of you, is hereby authorized to enter our appearance as petitioning creditors in any bankruptcy proceedings against the aforesaid debtor; to attend the meeting or meetings of creditors of the bankrupt aforesaid at a court of bankruptcy, wherever advertised or directed to be holden, on the day and at the hour appointed and notified by said court in said matter, or at such other place and time as may be appointed by the court for holding such meeting or meetings, or at which such other meeting or meetings, or any adjournment or adjournments thereof may be held, and then and there from time to time, and as often as there may be occasion, for claimant and in claimant's name to vote for or against any proposal or resolution that may be then submitted under the Acts of Congress relating to bankruptcy; and in the choice of trustee or trustees of the estate of the said bankrupt, and for claimant to assent to such appointment of trustee; and with like powers to attend and vote at any other meeting or meetings of creditors, or sitting or sittings of the court, which may be held therein for any of the purposes aforesaid; also to accept any composition proposed by said bankrupt in satisfaction of his debts, and to receive payment of dividends, and of money due claimant under any composition, and for any other purpose in claimant's interest whatsoever, with full power of substitution.

In Witness Whereof we have hereunto signed our name and affixed our seal the 9th day of March A. D. 1912.

(Y) The D. A. White Co. (L. S.)
(Corporate Seal) (Z) R. J. Schnieder (L. S.)

State of Ohio, County of Hamilton, ss:

Personally came R. J. Schnieder known to be the person who executed the foregoing instrument, who acknowledged said execution, and who, upon oath, says that he executed the same on behalf of said The D. A. White Com-

pany; that he is Treasurer of said corporation and that he is duly authorized to act.

Subscribed and acknowledged as above, on behalf of the claimant and individually and sworn to before me this 9th day of March, A. D. 1912.

W. A. Earls,

(Notary Seal.) Notary Public, Hamilton Co., O.

My Commission expires April 19, 1914.

COPY

$1388.19 Cincinnati, O., Feb. 14, 11. 191..

Thirty Months after date we promise to pay to the order of The D. A. White Co. Thirteen Hundred Eighty-eight and 19/100 Dollars at office of The I. Rheinstrom & Sons Co. with interest at 6% until paid Value received

Isaac Rheinstrom
Robt. J. Rheinstrom
Walter L. Bodman

No..... Due.....

COPY

$1388.19 Cincinnati, Ohio, Feb. 14, 11 191...

Twenty-four months after date we promise to pay to the order of The D. A. White Co. Thirteen Hundred Eighty-eight and 19/100 Dollars at Office of The I. Rheinstrom & Sons Co. with interest at 6% until paid Value received

Isaac Rheinstrom
Robt. J. Rheinstrom
Walter L. Bodman

No..... Due.....

COPY

$1388.19 Cincinnati, Ohio, Feb. 14, 11 191...

Eighteen months after date we promise to pay to the order of The D. A. White Co. Thirteen Hundred Eighty-eight and 19/100 Dollars at Office of The I. Rheinstrom & Sons Co. with interest at 6% until paid Value received

Isaac Rheinstrom
Robt. J. Rheinstrom
Walter L. Bodman

No..... Due.....

COPY

$1388.19 Cincinnati, Ohio, Feb. 14, 11 191...

One year after date we promise to pay to the order of The D. A. White Co. Thirteen Hundred Eighty-eight and 19/100 Dollars at Office of The I. Rheinstrom & Sons Co. with interest at 6% until paid. Value received

The I. Rheinstrom & Sons Co.
Isaac Rheinstrom, Pres.
Robt. J. Rheinstrom, Tres.

No..... Due.....

No. 359

THE D. A. WHITE COMPANY,

Sugar and Coffee.

Office: 114 East Third St. Telephones, Main 854, 853

Cincinnati, O., Oct. 12, 1911.

Sold to The I. Rheinstrom & Sons Co.

Terms Cash. 30 days net.

100 bbl Gran.	35249	7	2467.43

Car #79626

Duplicate

No. 928

THE D. A. WHITE COMPANY,

Sugar and Coffee.

Office: 114 East Third St. Telephones, Main 854, 853

Cincinnati, O., Oct. 31, 1911

Sold to The I. Rheinstrom & Sons Co.

Terms Cash. 30 days net Order #2300

100 bbl Gran	35449	6.59¼	2336.98

Car 7727

Duplicate

No. 438

THE D. A. WHITE COMPANY,

Sugar and Coffee.

Office: 114 East Third St. Telephones, Main 854, 853

Cincinnati, O., Nov. 14, 1911

Sold to The I. Rheinstrom & Sons Co.

Terms Cash. 30 days net.

100 bbl Gran.	35201	6.29¼	2215.02

Car 9863

Duplicate

STATEMENT

Cincinnati, O. Feb 17 1912

M The I. Rheinstrom Sons Co
To THE D. A. WHITE COMPANY,
No. 114 East Third Street.

Telephones Main 854, 853

1911						
Oct	12	To Mdse.	30 days	2467.43		
	31	"	30 days	2336.98		
Nov	14	"	30 days	2215.02		
						7019.43
1911						
Nov.	20	By Cash		1000.00		
"	28	" "		700.00		
Dec.	8	" "		500.00		
"	12	" "		1000.00		
1912						
Jan	20	" "		300.00		3500.00
		To Balance				3519.43
		Interest to February 15/1912				48.83
						$3568.26

PROOF OF DEBT CENTRAL TRUST CO.

(Filed May 6, 1912.)

At Chicago, in said Northern District of Illinois, on the fourth day of May, A. D. 1912, came William C. Cook, of Chicago, in the county of Cook and State of Illinois, and made oath and says that he is Vice President (there being no Treasurer and the said office of Vice President corresponding to the office of Treasurer) of Central Trust Company of Illinois,

a corporation incorporated by and under the laws of the State of Illinois, and carrying on business at Chicago in the County of Cook and State of Illinois, and that he is duly authorized to make this proof and says that said The I. Rheinstrom & Sons Company, the person against whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of the said petition, and still is justly and truly indebted to said corporation in the sum of Seven Thousand Eight Hundred Thirty-two Dollars and seventy-three cents ($7,832.73); that the consideration of said debt is money loaned said bankrupt, as evidenced by a certain collateral promissory note, which is hereto attached and filed herewith; that no part of said debt has been paid; that there are no set-offs or counterclaims to the same; and that the only securities now held by said corporation for said debt are six (6) barrels of cherries, and that after the sale thereof and deduction from the proceeds of such sale of all costs, attorney's fees and expenses made or incurred in respect to the sale of all the pledged property, there will remain in the hands of said corporation, to be applied in reduction of the said debt, a sum not to exceed Fifty Dollars ($50.00).

William C. Cook,
Vice President of said Central Trust Company of Illinois.

Subscribed and sworn to before me by said William C. Cook, this fourth day of May, A. D. 1912.

Arthur P. Thompson,
Notary Public.

(Seal)

COPY

"EXHIBIT A."

Chicago February 24th 1911

$10,260.00

Six (6) months days after date, the undersigned, for value received, promises to pay to the order of the Western Trust and Savings Bank Ten Thousand Two Hundred and Sixty and 00/100 Dollars at its offices in Chicago, with interest at the rate of 6 per centum per annum after due.

The undersigned has deposited with, and pledged to said Western Trust and Savings Bank as collateral security for the payment of the above and foregoing note, and also of all other liabilities of any kind of all or any one or more of the undersigned to said Bank due or to become due, heretofore or hereafter contracted, or which may hereafter arise, the following property owned by the undersigned, namely:

The negotiable Warehouse Receipts, numbered 5027, 5028, 5029, 5030, 5031 and 5032 of the B. & O. S-W. R. R. Co., dated at Cincinnati, Ohio, January 18, 1911, issued to the

undersigned under the name of The I. Rheinstrom Sons Co. for six hundred (600) barrels in the aggregate of cherries and duly endorsed by the undersigned; subject, however, to the pledge hereon endorsed, the market value of which is now $24,000.00

In case said Western Trust and Savings Bank shall at any time be of the opinion that said property is or may be of less value than above stated or that the whole or any part of said property has declined or may decline in value, or in case said Bank shall feel insecure, or in case any liability or liabilities of all or any one or more of the undersigned to the said Bank shall be at any time increased, then in all, any or either of such cases the said Bank may, in its discretion, call for additional security, satisfactory to it, and if the same is not furnished on demand, may, at its option declare this note, and also any and all other liabilities of all or any one or more of the undersigned to said Bank immediately due and payable, without notice or demand. And said Bank is hereby given further authority and power, from time to time, to sell or cause to be sold, all or any part of said pledged property and any property substituted therefor, and any additions which shall be made or accrue thereto, either on the maturity of any such liability or at any time thereafter, or before, if the property or substitutes or additions shall depreciate in value, or if said Bank shall feel insecure, at the discretion of said Bank, at public or private sale, without advertising the same or giving notice of such sale to any person or corporation, and without demand of payment, with the right to said Bank to buy the same or any part thereof at any public sale made hereunder, and upon such purchase thereafter to hold the same absolutely discharged from any claim or interest of the undersigned therein, and with the right also to said Bank at its discretion and in lieu of such sale to collect or to cause to be collected or otherwise converted into money all or any part of said pledged, substituted or additional property and securities; hereby also giving to said Bank authority, after first deducting from the proceeds of any such sale, collection or conversion, all costs, attorney's fees and expenses made or incurred in respect thereto, to apply such proceeds then remaining to the payment of all, either or any part of the said liabilities to said Bank, due or not due, in such order and manner as said Bank shall at its discretion choose, returning the overplus, if any, to or holding the same for the undersigned; and in case such proceeds shall not satisfy the whole of all said liabilities, costs and expenses, the undersigned agree to pay the deficiency forthwith to said Bank.

In case of any exchange of, or substitution for, or addition to said property so pledged, or any part thereof, all of

the provisions of this agreement shall extend to such new, exchanged, substituted or additional property. And the undersigned hereby authorize said Bank, at any time, at its discretion, to apply any money or moneys which said Bank may have or hold on deposit or otherwise, or in transit to it, for the undersigned, or either of them, towards the payment of said note and other liabilities, whether due or not. The undersigned hereby give to said Bank the option from time to time by written notice to the undersigned, to change the rate of interest thereafter to accrue on the foregoing note, and hereby agree to pay the said rate as changed, unless the undersigned shall at once elect to and forthwith pay said note, with the interest then due thereon, which notice of change of rate shall be sufficient if mailed to the address of the undersigned. All the provisions and powers hereof shall inure to the benefit of the assigns of said Bank.

The I. Rheinstrom & Sons Company
By Isaac Rheinstrom
its President
Robert I. Rheinstrom,
Treas.

No. 8539 Due Aug 24
Address Cincinnati, Ohio

The Warehouse Receipts described in the within note are subject to the pledge of the same under six (6) notes for $1,250.00 each, now outstanding of The I. Rheinstrom & Sons Company to the Western Trust & Savings Bank.

Receipt No. 5027 is for 100 barrels
Receipt No. 5028 is for 100 barrels
Receipt No. 5029 is for 124 barrels
Receipt No. 5030 is for 71 barrels
Receipt No. 5031 is for 100 barrels
Receipt No. 5032 is for 105 barrels

For Value Received, the undersigned hereby guarantee the payment of the within note at muturity and at all times thereafter, hereby expressly waiving presentment, demand, protest, notice of default or dishonor and every notice of any other nature that might otherwise be required.

Isaac Rheinstrom
Robert I. Rheinstrom
Walter F. Bodman

OBJECTIONS TO CLAIM OF CENTRAL TRUST CO.

(Filed Aug. 31, 1912.)

And now comes Central Trust Company of Illinois (a corporation organized and existing under and by virtue of the laws of the State of Illinois and having its principal place of business in the City of Chicago), a general creditor of said The I. Rheinstrom & Sons Company, bankrupt (whose proof of debt has heretofore been filed herein), by Rosenthal & Hamill, its attorneys, and objects on behalf of itself and all other creditors similarly situated and who will join in and contribute to the costs and expenses of the proceedings upon and arising out of these objections to the claim of Geo. Lueders & Company heretofore filed herein, for a lien, under and by virtue of Sections 2487, 2488, 2489, 2490 and 2491 of the Kentucky Statutes (Carroll, 1909), and to the granting or allowance of any such lien, and for causes of objection shows:

1. That the claim for which such lien is asserted, filed herein, does not comply in substance or in form with the statute in such case made and provided, and is insufficient to entitle said claimant to any benefit thereof.

2. That said claim has not been filed in the manner and within the time by said statute required.

3. That no suit has been filed to enforce said lien, as in said statute provided.

4. That said claim for said lien, filed herein, is vague, indefinite, uncertain and void, in that it does not state what materials or supplies were furnished by said claimant, as in said statute provided.

5. That said claim for said lien, filed herein, is vague, indefinite, uncertain and void, in that it does not state for what purpose the materials or supplies were furnished by said claimant, as in said statute provided.

6. That the goods, merchandise or wares furnished by said claimant to said bankrupt do not constitute such "materials or supplies" as to entitle said claimant to any lien whatever, by virtue of the said statute, or otherwise.

7. That said claim for said lien is vague, indefinite, uncertain and void, in that it does not state upon what property and effects the alleged lien is claimed, as in said statute provided.

8. That the property and effects which passed into the hands of the receiver, heretofore appointed and discharged by this court, and now in the hands of the trustee for the benefit of creditors, are not the property or effects of any mine, railroad, turn-pike, canal or other public improvement company,

or of any owner or operator of any rolling-mill, foundry or other manufacturing establishment, as in said statute provided.

9. That the business carried on by said bankrupt is not, and has not at any time been the business of any mine, railroad, turn-pike, canal or other public improvement company, or of any rolling-mill, foundry or other manufacturing establishment.

10. That said claim for said lien does not state that the title to said materials and supplies passed from said claimant to said bankrupt in the State of Kentucky and that, therefore, no lien under or by virtue of said statute can arise on account or by reason of the furnishing of said materials and supplies.

11. That said claimant is not a citizen or resident of the State of Kentucky, or engaged in business in said state, nor incorporated under the laws of said state, and is, therefore, not entitled to the rights or benefits conferred by said statute.

12. That said statute is unjust, discriminatory and void, in that it favors creditors of certain companies and establishments and does not similarly favor creditors of other companies and establishments, without any reasonable basis or justification for such discrimination.

13. That said statute is unjust, discriminatory and void, in that it deprives creditors, other than those who have furnished materials or supplies for the carrying on of the business of the bankrupt, of their property without due process of law.

14. That said statute is unjust, discriminatory and void, because it impairs the rights of judgment creditors.

15. That said statute is unjust, discriminatory and void, because it creates a secret lien.

16. That said statute is unjust, discriminatory, and void, because it is contrary to the public policy of the State of Kentucky.

17. That said statute is unconstitutional and void, because it is contrary to the provisions of and in conflict with the United States bankruptcy law, entitled "An Act to establish a uniform system of bankruptcy throughout the United States," of July 1, 1898, and the amendments thereto.

18. That, by reason of the provisions of said United States bankruptcy law, said claimant is not entitled to said lien.

19. That the Act of February 25, 1893, as amended, is unconstitutional and void, in that it is contrary to the provisions of Section 51 of the constitution of the Commonwealth of Kentucky.

20. That said statute is unconstitutional and void, because it is contrary to and in conflict with the provisions of the constitution of the Commonwealth of Kentucky.

21. That said statute is unconstitutional and void, because it is contrary to and in conflict with the provisions of the constitution of the United States.

22. That the acceptance by said claimant of a note or notes in payment of the indebtedness of said bankrupt to said claimant, is a discharge and release of such lien and any claim thereto, and constitutes a full and complete waiver of such lien.

23. That said claimant is a foreign corporation doing business in Kentucky without license or authority, and that on account thereof said claimant is not entitled to the benefit of said Statute, or any lien under or by virtue thereof.

Wherefore, the undersigned prays that said claim may be disallowed as a claim for a lien and that no lien shall attach for the benefit of the said claimant upon any of the property and effects of the said bankrupt, or any part thereof, and that no lien whatsoever shall be adjudged in favor of said claimant.

Central Trust Company of Illinois,
By Rosenthal & Hamill,
Its Attorneys.

Leo F. Wormser,
Of Counsel.

OBJECTIONS TO CLAIM CENTRAL TRUST CO.

(Filed Aug. 31, 1912.)

And now comes Central Trust Company of Illinois (a corporation organized and existing under and by virtue of the laws of the State of Illinois and having its principal place of business in the City of Chicago), a general creditor of said The I. Rheinstrom & Sons Company, bankrupt (whose proof of debt has heretofore been filed herein), by Rosenthal & Hamill,

its attorneys, and objects on behalf of itself and all other creditors similarly situated and who will join in and contribute to the costs and expenses of the proceedings upon and arising out of these objections, to the claim of D. A. White Co. heretofore filed herein, for a lien, under and by virtue of Sections 2487, 2488, 2489, 2490 and 2491 of the Kentucky Statutes (Carroll, 1909), and to the granting or allowance of any such lien, and for causes of objection shows:

1. That the claim for which such lien is asserted, filed herein, does not comply in substance or in form with the statute in such case made and provided, and is insufficient to entitle said claimant to any benefit thereof.

2. That said claim has not been filed in the manner and within the time by said statute required.

3. That no suit has been filed to enforce said lien, as in said statute provided.

4. That said claim for said lien, filed herein, is vague, indefinite, uncertain and void, in that it does not state what materials or supplies were furnished by said claimant, as in said statute provided.

5. That said claim for said lien, filed herein, is vague, indefinite, uncertain and void, in that it does not state for what purpose the materials or supplies were furnished by said claimant, as in said statute provided.

6. That the goods, merchandise or wares furnished by said claimant to said bankrupt do not constitute such "materials or supplies" as to entitle said claimant to any lien whatever, by virtue of the said statute, or otherwise.

7. That said claim for said lien is vague, indefinite, uncertain and void, in that it does not state upon what property and effects the alleged lien is claimed, as in said statute provided.

8. That the property and effects which passed into the hands of the receiver, heretofore appointed and discharged by this court, and now in the hands of the trustee for the benefit of creditors, are not the property or effects of any mine, railroad, turn-pike, canal or other public improvement company, or of any owner or operator of any rolling-mill, foundry or other manufacturing establishment, as in said statute provided.

9. That the business carried on by said bankrupt is not, and has not at any time been the business of any mine, railroad, turn-pike, canal or other public improvement company, or of any rolling-mill, foundry or other manufacturing establishment.

10. That said claim for said lien does not state that the title to said materials and supplies passed from said claimant to said bankrupt in the State of Kentucky and that, therefore,

no lien under or by virtue of said statute can arise on account or by reason of the furnishing of said materials and supplies.

11. That said claimant is not a citizen or resident of the State of Kentucky, or engaged in business in said state, nor incorporated under the laws of said state, and is, therefore, not entitled to the rights or benefits conferred by said statute.

12. That said statute is unjust, discriminatory and void, in that it favors creditors of certain companies and establishments and does not similarly favor creditors of other companies and establishments, without any reasonable basis or justification for such discrimination.

13. That said statute is unjust, discriminatory and void, in that it deprives creditors, other than those who have furnished materials or supplies for the carrying on of the business of the bankrupt, of their property without due process of law.

14. That said statute is unjust, discriminatory and void, because it impairs the rights of judgment creditors.

15. That said statute is unjust, discriminatory and void, because it creates a secret lien.

16. That said statute is unjust, discriminatory, and void, because it is contrary to the public policy of the State of Kentucky.

17. That said statute is unconstitutional and void, because it is contrary to the provisions of and in conflict with the United States bankruptcy law, entitled "An Act to establish a uniform system of bankruptcy throughout the United States," of July 1, 1898, and the amendments thereto.

18. That, by reason of the provisions of said United States bankruptcy law, said claimant is not entitled to said lien.

19. That the Act of February 25, 1893, as amended, is unconstitutional and void, in that it is contrary to the provisions of Section 51 of the constitution of the Commonwealth of Kentucky.

20. That said statute is unconstitutional and void, because it is contrary to and in conflict with the provisions of the constitution of the Commonwealth of Kentucky.

21. That said statute is unconstitutional and void, because it is contrary and in conflict with the provisions of the constitution of the United States.

22. That the acceptance by said claimant of a note or notes in payment of the indebtedness of said bankrupt to said claimant, is a discharge and release of such lien and any claim thereto, and constitutes a full and complete waiver of such lien.

23. That said claimant is a foreign corporation doing business in Ohio without license or authority, and that on

account thereof said claimant is not entitled to the benefit of said Statute, or any lien under or by virtue thereof.

Wherefore, the undersigned prays that said claim may be disallowed as a claim for a lien and that no lien shall attach for the benefit of the said claimant upon any of the property and effects of the said bankrupt, or any part thereof, and that no lien whatsoever shall be adjudged in favor of said claimant.

Central Trust Company of Illinois,
By Rosenthal & Hamill,
Its Attorneys.

Leo F. Wormser,
Of Counsel.

TESTIMONY OF EDGAR MARTIN LEWIS.

(Filed Nov. 4, 1912.)

At Covington, in said district, on the 4th day of November, A. D. 1912, before Martin M. Durrett, referee in bankruptcy.

This is an adjourned meeting on the questions raised by the trustee's exceptions to various claims herein.

On the question of the status of the bankrupt as to whether it is or it is not, a manufacturing concern, Messrs. DeCamp and Sutphin introduced

E. M. LEWIS,

who being first duly sworn, deposes as follows:

EXAMINED

By Mr. Bramlage, of DeCamp & Sutphin:

Q. 1. Mr. Lewis, give us your full name? A. Edgar Martin Lewis.

Q. 2. What business were you in? A. I was superintendent of the I. Rheinstrom Sons Co.

Q. 3. What were your particular duties as superintendent?

A portion of the answer, that this is a manufacturing concern, objected to by the trustee.

A. To the producing of the finished articles from the time it was received until the day we were ready to ship it, in barrels or cases, after going through its process.

Q. 4. What business was the I. Rheinstrom Sons Company engaged in? A. In the business of what was termed Maraschino cherries.

Q. 5. What was the term Maraschino cherries? A. The term Maraschino has applied, for thirty or forty years to a cherry which was processed in a number of ways to resemble somewhat a bright natural cherry. It was flavored with various ingredients to give it a peculiar flavor, and it was used principally as a garnish, or in salads or in various drinks or creams and desserts. That is about all of the uses.

Q. 6. In producing the Maraschino cherries state just what was done, where you got your articles, and what articles you used, commencing with the first step until you shipped to the consumers? A. The cherry they formerly used came from the north of Greece, or Italy, it was a large white hearted, meaning a large white meated, cherry; it is a freestone cherry that should be easily pitted. These cherries were picked from the trees in such a manner that the stems remained attached with the fruit. The fruit was then put through a process of sulphuring, either by a heat or liquid means, and all color bleached out. Up to this time the cherry is still in Greece or Italy before we purchase the cherry; before it leaves that country. After the color is bleached out, this fruit is packed into casks containing brine and a percentage of sulphurous acid. The fruit was then shipped to us in these same casks; that covers the point up to where we received it in the factory. Upon receipt of the casks, when this fruit was received by us at the factory, it resembled, or it was, a large yellow colored, firm cherry to which was still attached the stem, and inside was the pip. Our first step was to drain off the brine and sulphurous acid; it was not palatable.

Q. 7. You say it was not palatable? A. It was not palatable. The fruit was then washed in various changes of fresh water to remove all traces of the brine and acid. The next step was to removed the stems; this was done by hand, by girls who performed this operation, and then removed the pip by machine, which we had designed for that purpose. After pitting the cherry is dropped into a tub of water, where it remains until it is taken into the processing department. After a sufficient quantity of fruit

was pitted and taken to the processing department it went through a number of washings in clear cold water to remove from the interior of the cherry any brine and acid which had sipped into the skin; the number of these washes depended upon the condition of the fruit as determined by aniline. After the washing, the next step was to color it. This was done by immersing the fruit into a solution, made up of either aniline or vegetable color and water. It was allowed to stand in the color until it was determined by inspection it was ready for the next step, which was the first syrup stage. After the proper color had been reached, the color solution was drained off and replaced with a heavy syrup, made up of cane sugar and water. This was placed into the vacuum kettles and the cherries drained were dumped into this heavy syrup. The liquid remaining in the cherry diluted this syrup from a heavy, or what we term, low Beaume or thin syrup, allowing the fruit to remain in the vacuum kettle for about twelve hours, with an open kettle surrounding the kettle with a hot water bath, we commence the first mechanical operation. After remaining in open kettles for about twelve hours we converted these kettles into vacuum kettles by putting air tight kettles on them and making connection by a hose with vacuum pumps. We commenced the cooking operation in vacuum. This operation lasted from twenty-four to forty-eight hours, according to different conditions, and possibly from time to time the syrup in the kettle was supplemented with either additional heavy syrup or cane sugar. In the vacuum kettle, during these twenty-four or forty-eight hours, the syrup originally placed therein was concentrated from possibly a ten degree Beaume syrup to a twenty to thirty degree Beaume syrup. This was accomplished by maintaining a temperature in the bath surrounding the kettle to cause a boiling temperature in vacuum on the inside of the kettle. After the syrup was concentrated to a point about thirty degrees Beaume, it requiring, as stated before, from twenty-four to forty-eight hours, the cherry was then finished so far as the cooking was concerned; the kettles were then emptied into containers, taking up with the fruit the syrup as well, and the syrup and cherry taken to the bottling department. Here, girls employed for that purpose graded out the fruit, sorting the whole cherries into grades and throwing aside the broken cherries. The cherries here were either put into bottles or other containers, and syrup, to which had been added flavor of some sort, was placed in these containers. If these containers were bottles or cans they were immediately sterilized and capped and were then ready for the label; if barrels, the cherries taken to the

bottling tables, were put into a wooden receptable and syrup flavored as in the case of bottling, syrup was added, also, a preservative, such as benzoate soda added to water to keep the goods from fermenting. The bottles were labeled and then packed into cases, nailed up, and made ready for shipment.

Q. 8. What is the label? A. The labels contained the brand, the name of the customer; if a private brand, the clause "packed for," or "distributed by", or some such clause to designate that the customer was not the producer, or, if any preservative had been added that had to be so stated on the label, and also a clause to show that the fruit was artificially colored, if artificial color was used, the produce was called only "cherries." If Maraschino flavor was used the produce was called "flavored Maraschino cherries," or "Maraschino flavored cherries." If the goods were shipped out under our own label the label bore the name of the brand which was either Gold Top, Silver Top, Tip Top, Triumph, Extra Select, Triumph Select, Whole and Broken, also the clause, "artificially colored" and the clause to indicate the preservative, if any had been used, the guarantee under the National Pure Food and Drug Act and the serial number, and the name of our Company. Where artificial flavoring had been used the various grades of the cherries were designated by the brand for that particular grade, followed by the word cherries. Where true Maraschino flavor was used instead of the word "cherries" only, we used the term Maraschino flavored cherries. In the case of bought goods, barrels ready for shipment, we stencil on the heads, the contents in gallons, and practically the same information that appeared upon the labels.

Q. 9. Mr. Lewis, how long did it take to finish from the time received? A. The cherry could be finished from the time when received and shipped out within six days, by our special process.

Q. 10. How long did it usually take? A. Six days.

Q. 11. What use could it be put to when you first received it, if you know? A. No purpose that I know of.

Q. 12. You spoke about a washing when you received the cherries, how many did you usually give those cherries? A. That depends upon the conditions, if they have been preserved in a strong brine, stemless, or if a percentage of acid was used, we washed them more frequently. It usually required altogether from six to nine washings, that is, from the time the barrels were opened and dumped until the fruit went into color.

Q. 13. In removing the brine and sulphur, how was that done ? A. That was removed simply by soaking the fruit in the water; that was a part of the washing.

Q. 14. At another time after the cherry had been stemmed and pitted, after it had received these several washings, which you have just told us, you said the cherries were dropped into tubs of water in the process department, how many times? A. Not in the process department, the tubs were efficient to and were part of our pitting machine, the cherry dropped into the tub immediately upon being pitted. It remained there until the tub was dumped, which was twice a day. This was accomplished by simply lifting the tub off the shafting which supported the machine and dumping it into another receptacle, all the time the fruit being allowed to remain in water, which was necessary when handling it to keep from breaking down the fiber cells of the cherry.

Q. 15. You spoke about immersing the fruit into coloring waters, what were they, and what ingredients did you use? A. We used coloring cochineal, certified Ponceau No. 3R and Certified Imperial Red colors. These were both coal tar, ore aniline colors. We had also used, for experimental purposes only, a number of other coal tar colors, Certified Imperial Red, and Certified Mint Green color; in one case to get a red cherry and the other a green cherry. The colors used for experimental purposes as near as I can remember, were, Erythrosine, Carminoline, Carmine 40; that is all I can recall.

Q. 16. Mr. Lewis, how long was it allowed to remain in coloring matter? A. Various times, it depended upon what kind of color was used; for aniline color about twenty-four hours, for vegetable or cochineal color, I might here state, cochineal is called a vegetable color, but is really not; cochineal required thirty-six hours.

Q. 17. After that, before it was put in the heavy syrup, it was drained off by machinery? A. By means of a siphon.

Q. 18. What was the object? A. By causing these to remain would dilute the syrup and would make such a volume that we could not handle it, and would make it so thin it would not answer our purpose.

Q. 19. The next step was to put the cherries into a heavy syrup, what was that composed of? A. The syrup was composed of standard granulated sugar and clear water.

Q. 20. I understood you to say that was allowed to remain for twelve hours, and then put into a vacuum around which was boiling water? A. Not boiling water,

the temperature of the bath surrounding the kettle ranged from 140 to 190 degrees Fahrenheit, according to conditions.

Q. 21. When it was in the vacuum was there ingredients in with it? A. Nothing except the color; nothing in the fruit when placed in the kettle, but the syrup.

Q. 22. You spoke of flavors that they used, can you tell us what they are? A. We have used for flavoring at various times, Marasque water, true Maraschino, and flavors compounded from benzaldehyde, syringa, true oil of bitter almonds, spirits, and oil of peppermint, the oil last used was the only flavor used for green cherries.

Q. 23. Tell us what the real Maraschino is? A. The real Maraschino, or true Maraschino, as we term it, is an unsugared distillate of the real Maraschino cherry, which is grown only in the mountains of Dalmatia, Austria.

Q. 24. Mr. Lewis, you told us that the bottles are sterilized and capped, when is that done? A. The bottles are sterilized and capped after being filled with the graded cherries by the bottling girls, and as the bottles are filled with cherries the flavored syrup mentioned, is put into the bottles filling same to the top.

Q. 25. Tell us how they were sterilized? A. Sterilization was accomplished by means of placing quantities of bottles or cans into a large receptacle containing water, at a temperature at the beginning of 120 to 140 degrees. This stage of sterilization lasted from five minutes to possibly one hour, depending upon the sizes. The next step was to immerse to within a short distance of the top of the container the bottles or, hot water bath of 180 degrees Fahrenheit. This temperature was maintained for definite periods of time and then the containers were lifted out into a cooling tank of about 100 degrees Fahrenheit.

Q. 26. How long did that operation take? A. The latter operation required from forty minutes to an hour and a quarter. The bottles were sealed while in the bath of 180 degrees. This sealing was to clamp down on the bottle or can a suitable cap, which was either clamped or molded on by a machine, or soldered on as the case demanded.

Q. 27. Mr. Lewis, will you kindly state the difference in appearance when you received it and the finished cherry; about the different kinds? A. The difference between the cherry as received by us and after it was processed, was only in color, and general appearance, from the fact that it was stemmed and bore the imprint or the cut of the pipping operation. The cherry as received was a yellow cherry with the stem, at the finish was either red, yel-

low, called white, or green; in size there was no change. In texture the finished cherry was more tender than the cherry as received.

Q. 28. State what the flavor of the original cherry was and the flavor of the finished cherry, as received by you? A. The flavor as received was never tasted by me, but once, and that was enough. It was just merely a briny flavor, also, very very strong; also the sulphurous acid, used as a preservative, which was required to keep the fruit in the original shipping condition until it reaches our factory, the finished cherry having been flavored with the heavier flavor, no trace of the original cherry flavor which it might have had was evident.

Q. 29. Are the cherries pulled green and put in brine? A. They are pulled from the trees just before they reach the ripened stage. In other words, just as they turn.

Q. 30. Did you say that after the cherry was finished it did not have the taste of the original cherry? A. On account of not having the taste there was no evidence of the original flavor, but in experimental work I have been able to work through the process the real cherry flavor, I stated that because it was in experimental work and did not apply to the entire output.

Q. 31. That was with artificial flavor? A. No, that was the natural cherry flavor in the experimental work; I have been able to carry through the process, the original cherry flavor. This was accomplished by using California fruit, which had not been put up in brine. We have, at the factory, produced cherries for shipment under the same conditions as this experimental work, but, of course, did not depend upon the natural cherry flavor for the flavor required by the trade.

Q. 32. What is that flavor required by the trade? A. The flavor required by the trade is principally bitter almond flavor. It is a heavy oil, which we had.

Q. 33. State whether or not it was your aim to produce the flavor of the real Maraschino cherry? A. No, the flavor of the real Maraschino cherry was absolutely different from the flavor of the so-called Maraschino cherry of trade, that is the cherry that has been known for thirty or forty years as a Maraschino cherry, the flavor which we used was one which had been used for years, or was like one that had been used for years, and was regarded as a recognized flavor for Maraschino cherries up to the time when the Pure Food Department made its ruling on what is Maraschino.

Q. 34. State the difference in the uses of the cherry as received by you and as sold by you? A. To my knowl-

edge the cherry as received by us has no uses except for our purpose, as sold by us is used for the uses I have already mentioned; garnishing and salads, and ice cream, and for cocktails.

Q. 35. You mentioned Marasque water as a flavor too, what is that? A. Marasque water is an imitation of genuine Maraschino flavor, just how it is made I am not familiar with, as we never used it long enough.

Q. 36. Mr. Lewis, the claiam of G. S. Nicholas & Company is for certain materials and supplies furnished the bankrupt, as follows: Unsugared Maraschino liquor, which is a liquor or distillate, prepared by a process of distillation of Maraschino cherry, a similar variety of the European wild cherry; indigenous to Dalmatia mountains. Was that particular supply or material, as there described, ordered or required by the bankrupt for the purpose of producing a flavor in the cherry which you have described? A. Yes, for the true Maraschino flavor.

Q. 37. Did the cherry to which that flavor was applied have any Maraschino flavor before that? A. No.

Q. 38. The claim of George Leuders & Company for materials and supplies sold the bankrupt, is based upon the following supplies and materials: $1414.33 worth, being 1529 gallons, of Marasque water, said Marasque water being a water distilled with sour cherries, grown in southern France; their claim also is for $35.00 worth of oil of bitter almonds, being oil distilled from bitter almonds, and $120.00 worth of oil of syringa, and a synthetic article used for flavoring; were the supplies and materials I have just mentioned, being the Marasque water, oil of bitter almonds, and oil of syringa, used or not, and ordered by your company to be used? A. Yes.

CROSS EXAMINATION

By Leo F. Wormser, Esq., on behalf of the Trustees and Central Trust Co. of Ill.:

Q. 39. Mr. Lewis, you mentioned that the stems were picked from the cherries by hand, and the cherry was then handled to be put into the pitting machine. With the exception of these two operations was the cherry actually handled except when put into the bottle at the completion of the process? A. No, it was not; only in bulk, that is, in large containers.

Q. 40. So that, in washing the cherry, and in coloring the cherry, and in flavoring the cherry, the fact is, that the cherry was lying in a tub not dissimilar to a bath tub, is that right? A. In the washing and coloring the cherry

remained in a wooden tub, like a half of a barrel, and after that was put into a bath tub, by dumping the wooden tub into the bath.

Q. 41. And the fact is, that while the cherries were lying in the tubs, there was simply passed over the cherries the water to wash it, the color to color it, or the syrup to flavor it? A. It was passed over in the case of coloring and syrup and allowed to remain for a time.

Q. 42. And these fluids were passed into these tubs by means of a hose? A. Yes.

Q. 43. And these fluids were drained from the tub by means of siphons or other drains, is that right? A. Yes.

Q. 44. In reference to the flavoring fluids that you mentioned, Marasque water and true Maraschino, when true Maraschino was used, Marasque water was not used at all? A. No.

Q. 45. And the converse of that is true also? A. Yes.

Q. 46. You were in and about the plant of The I. Rheinstrom & Sons Company from day to day and saw these cherries from the time they arrived in casks immersed in brine until shipped out? A. Yes.

Q. 47. And you were the superintendent of that department which had in charge the process? A. As superintendent I had charge not only of the process but of all the departments pertaining to the factory.

Q. 48. And all of these came under your personal observation? A. Every bit.

Q. 49. Having in mind your experience, suppose you had marked a particular cherry contained in a particular cask as it arrived at the plant, would the cherry, when it came out in its finished condition, be recognizable by you? A. Absolutely so, unless handled and destroyed, which was not the case.

Q. 50. If the mark were cut into the cherry and were not a mark by a pencil so that it could not be erased, you could, could you not, identify that cherry? A. Absolutely so, it could be followed through the process.

Q. 51. When these cherries were shipped, the labels on the bottles or cans gave the cherries a name, you stated. Disregarding now the name of the brand, was the cherry, in all instances, or in the great majority of cases, described as a particular kind of cherry, as, for instance, was it uniformly called a Maraschino cherry? A. Yes, up to the ruling of the Pure Food Department about some time in the early summer of 1911 as near as I can recollect.

Q. 52. Was the name Maraschino given to a green, as well as red cherry? A. No, never used in connection with green cherries.

Q. 53. After the ruling of the Department of Agriculture what did you call the cherries? A. Where artificial flavor was used, cherries were designated simply as "cherries," or "whole cherries," "fine cherries," or some such term. Where the true Maraschino was employed as a flavor, then we designated our product as "Maraschino flavored cherries," and the goods were branded accordingly.

Q. 54. State, if you know, whether the demand for cherries decreased because the word "Maraschino" was omitted from the label of the cherry? A. No, the demand did not decrease.

Q. 55. The label and letterheads of the bankrupt, showed the corporate name of The I. Rheinstrom & Sons Company, is that so? A. Yes.

Q. 56. And, as what was the company described on that letterhead? A. I would not like to go on record definitely on this point, I didn't see enough of the letterheads, having to do with the factory only, but my recollection of the letterhead is that it stated that we were "Fruit Preservers."

Q. 57. Did you ever taste a genuine Maraschino cherry, such as you brought over from Italy, before the brine and sulphurous acid was added? A. No.

Q. 58. Then you don't know what the taste of a true or genuine Maraschino cherry is, yes or no? A. No.

Q. 59. What was the purpose in Italy, before exporting these cherries to America, of adding brine and sulphurous acid? A. The brine was added as a preservative to keep the fruit from spoiling in storage; the sulphurous acid was added to keep the color, the original natural color, bleached out, and also was, in itself, a preservative against fermentation or spoiling.

Q. 60. Mr. Lewis, you have testified that the entire process which you have described here in detail took six days. What portion of that time was consumed in putting the cherry through the six or nine washings, which you said were required to free the cherry from the brine and sulphurous acid? A. About twenty-four hours.

Q. 61. Now, wasn't the object of those washings and the removal of the brine and sulphurous acid to bring the cherry back as nearly as possible to the same condition that it was in before it was put into that brine and sulphurous acid, at the point of original shipment? A. Yes.

RE-DIRECT EXAMINATION

By Mr. Bramlage:

Q. 62. Mr. Lewis, this cherry after it has gone through the several processes, either the red or green cherry, is different in color and so on, from the original cherry, isn't it? A. Yes.

Q. 63. Mr. Lewis, in putting this cherry through these different processes is any stirring done? A. Not necessarily. It is not necessary.

Q. 64. What is customary? A. No, stirring is not customary, I have resorted to it occasionally, but the results were no better.

Q. 65. Did you use domestic cherries? A. We have used California cherries for the same purpose.

STIPULATION.

(Filed Aug. 21, 1913.)

It is hereby stipulated and agreed by and between Central Trust Company of Illinois, by Rosenthal & Hamill, its attorneys, Covington Savings Bank and Trust Company, as trustee, by Harmon, Colston, Goldsmith & Hoadly, its attorneys, George Lueders & Company and G. S. Nicholas & Company, by DeCamp & Sutphin, their attorneys, and D. A. White Company, and others, by Burch, Peters & Connolly, their attorneys, as follows.

1. That The I. Rheinstrom & Sons Company is a corporation organized and existing under and by virtue of the laws of the State of Ohio.

2. That Articles of Incorporation bearing date March 3, 1909, and recorded in the office of the Secretary of State of the State of Ohio March 4, 1909, in Volume 139, page 651, of the Records of Incorporation, were duly issued to and accepted by said The I. Rheinstrom & Sons Company, and that the third of said Articles provided:

"Said corporation is formed for the purpose of buying, selling, dealing, preserving and packing fruits, vegetables, fruit products and similar articles in the State of Ohio and elsewhere."

Dated August 21, 1913.

Central Trust Company of Illinois,
By Rosenthal & Hamill,
Its Attorneys,

Covington Savings Bank and Trust Company,
By Harmon, Colston, Goldsmith & Hoadly,
Its Attorneys,

George Lueders & Company and
G. S. Nicholas & Company,
By DeCamp & Sutphin,
Their Attorneys.

D. A. White Company, et al.,
By Burch, Peters & Connolly,
Their Attorneys.

FINDING AND ORDER OF REFEREE.

(Filed Nov. 18, 1912.)

Various creditors of the bankrupt filed claims against the estate, in which they claim a lien thereon. The claim for a lien is based on the allegation that, articles composing the claims were materials and supplies furnished by the claimants to the bankrupt for the carrying on of its business, and that the bankrupt was such manufacturing establishment as is affected by section 2487 of the Kentucky Statutes.

That statute is as follows:

"When the property or effects of any (mine), railroad, turnpike, canal or other public improvement company, or of any owner or operator of any rolling mill, foundry or other manufacturing establishment, whether

incorporated or not, shall be assigned for the benefit of creditors shall come into the hands of any executor, administrator, commissioner, receiver of a court, trustee or assignee for the benefit of creditors, or shall in any wise come to be distributed among creditors, whether by operation of law or by the act of such company, owner or operator, the employes of such company, owner or operator in such business, and the persons who shall have furnished materials or supplies for the carrying on of such business shall have a lien upon so much of such property and effects as may have been involved in such business, and all the accessories connected therewith, including the interest of such company, owner or operator in the real estate used in carrying on such business. (The amendment of March 23, 1894, inserted "mine" in first line.)

The trustee and Central Trust Company of Illinois, creditor, jointly filed exceptions to the allowance of any of these claims as secured.

Their bill of exceptions is as follows:

1. That the claim for which such lien is asserted, filed herein, does not comply in substance or in form with the statute in such case made and provided, and is insufficient to entitle said claimant to any benefit thereof.

2. That said clam has not been filed in the manner and within the time by said statute required.

3. That no suit has been filed to enforce said lien, as in said statute provided.

4. That said claim for said lien, filed herein, is vague, indefinite, uncertain and void, in that it does not state what materials or supplies were furnished by said claimant, as in said statute provided.

5. That said claim for said lien, filed herein is vague, indefinite, uncertain and void, in that it does not state for what purpose the materials or supplies were furnished by said claimant, as in said statute provided.

6. That the goods, merchandise or wares furnished by said claimant to said bankrupt do not constitute such "materials or supplies" as to entitle said claimant to any lien whatever, by virtue of the said statute, or otherwise.

7. That said claim for said lien is vague, indefinite, uncertain and void, in that it does not state upon what property and effects the alleged lien is claimed, as in said statute provided.

8. That the property and effects which passed into the hands of the receiver, heretofore appointed and discharged by this court, and now in the hands of the trustee for the benefit of creditors, are not the property or effects of any mine, railroad, turn-pike, canal or other public im-

provement company, or of any owner or operator of any rolling-mill, foundry or other manufacturing establishment, as in said statute provided.

9. That the business carried on by said bankrupt is not, and has not at any time been the business of any mine, railroad, turn-pike, canal or other public improvement company, or of any rolling-mill, foundry or other manufacturing establishment.

10. That said claim for said lien does not state that the title to said materials and supplies passed from said claimant to said bankrupt in the State of Kentucky and that, therefore, no lien under or by virtue of said statute can arise on account or by reason of the furnishing of said materials and supplies.

11. That said claimant is not a citizen or resident of the State of Kentucky, or engaged in business in said state, nor incorporated under the laws of said state, and is, therefore, not entitled to the rights or benefits, conferred by said statute.

12. That said statute is unjust, discriminatory and void, in that it favors creditors of certain companies and establishments and does not similarly favor creditors of other companies and establishments, without any reasonable basis or justification for such discrimination.

13. That said statute is unjust, discriminatory and void, in that it deprives creditors, other than those who have furnished materials or supplies for the carrying on of the business of the bankrupt, of their property without due process of law.

14. That said statute is unjust, discriminatory and void, because it impairs the rights of judgment creditors.

15. That said statute is unjust, discriminatory and void, because it creates a secret lien.

16. That said statute is unjust, discriminatory and void, because it is contrary to the public policy of the State of Kentucky.

17. That said statute is unconstitutional and void, because it is contrary to the provisions of and in conflict with the United States bankruptcy law, entitled "An Act to establish a uniform system of bankruptcy throughout the United States," of July 1, 1898, and the amendments thereto.

18. That, by reason of the provisions of said United States bankruptcy law, said claimant is not entitled to said lien.

19. That the Act of February 25, 1893, as amended, is unconstitutional and void, in that it is contrary to the

provisions of Section 51 of the constitution of the Commonwealth of Kentucky.

20. That said statute is unconstitutional and void, because it is contrary to and in conflict with the provisions of the constitution of the Commonwealth of Kentucky.

21. That said statute is unconstitutional and void, because it is contrary to and in conflict with the provisions of the constitution of the United States.

22. That the acceptance by said claimant of a note or notes in payment of the indebtedness of said bankrupt to said claimant, is a discharge and release of such lien and any claim thereto, and constitutes a full and complete waiver of such lien.

23. That said claimant is a foreign corporation doing business in Kentucky without license or authority, and that on account thereof said claimant is not entitled to the benefit of said Statute, or any lien under or by virtue thereof.

At a preliminary hearing, I held that some of the claims were not specific enough, in that they did not show what the articles were on which they were based; and therefore it could not be determined whether or not the articles were "materials and supplies" for the carrying on of the business. I gave the claimants leave to amend, which was done. Counsel practically limited their arguments and briefs to specifications Nos. 8 and 9 of the bill of exceptions.

In view of what follows, it seems to me that the solution of the questions thereby raised renders it unnecessary to further advert to the other specifications.

It was very earnestly contended by counsel that if the bankrupt was a "manufacturing establishment," it was not such as was contemplated by the statute supra. They contended that the words "or other manufacturing establishment" as used in the statute should be construed under the doctrine of ejusdem generis. Counsel cite many authorities which seem to support their contention; but, without taking them up, it seems to me, their contention can not be sustained because the statute has been construed by the Kentucky courts to apply to such other manufacturing establishment as must have been excluded if that doctrine had been applied.

Thus in Hall & Son vs. Guthrie Sons Assignee, 31 Ky. Law Rep., 801, the statute was held applicable to a flouring mill, and to a sawmill in Graham vs. Magann Lumber Co., 118 Ky., 192, and Bogard vs. Tyler, Admr., etc., 21 Ky. Law Rep., 1452, and to an establishment manufacturing a cut-off for a cistern in Winter vs. Howell, Assignee, 109 Ky., 163. It is objected that in Bogard vs.

Tyler the construction of the statute was not necessary to the determination of the court. But the court did construe the statute and said:

"There must be a manufacturing establishment, and under the evidence in this case, as the sawmill was engaged in manufacturing lumber for the market, we think there was."

This construction has been followed by this court. In in re: Bennet, 153 Fed., 673, the statute was applied to the business of manufacturing barrels; and to the manufacture of shirts in Falls City Shirt Mfg. Co., 98 Fed., 592; and to the manufacture of saddles and harness in Stark-Ullman Saddlery Co., 171 Fed., 834.

I now take up the question as to whether or not the bankrupt's business was a "manufacturing establishment."

If it was not, no other point need be raised or considered; and the exceptions must be sustained.

The word manufacture means literally, to make by hand. Worcester, in his dictionary, says, "lexicographers define manufacture to be the process of making anything by act, or reducing materials into a form fit for use by the hand or by machinery."

The Standard Dictionary has it "the making of wares or other products by hand, by machinery, or by other agencies."

Webster defines it "to make or fabricate from raw materials by the hand, by act, or machinery, and work into forms convenient for use," z. "to work raw materials into suitable forms for use."

Counsel agree to the definition of the word in City of Memphis vs. St. Louis & S. F. R. Co., 183 Fed., 529, where the court held that the mere fact of the application of labor to an article, does not in itself make it a manufactured article, unless the application of such labor effects some transformation and converts it into a new and different article, having a distinctive name, character or use.

This definition was evidently adopted from the case of Hartrauft vs. Wiegmann, 121 U. S., 609. In this case the question was whether shells in which the epidermis is first cleaned off, and then are ground or polished by an emery wheel and acid, to expose the pearly interior. The court holding they were not manufactured, said:

"They were still shells. They had not been manufactured into a new and different article, having a distinctive name, character or use, from that of a shell."

The question is, did the bankrupt's business come within the above definitions and constructions?

The bankrupt purchased cherries in Italy which were picked with the stems on shortly before they were ripe, immersed in a solution of brine and sulphur and packed in casks. I now quote from the brief of counsel for claimants, page 4:

"When these cherries came to them (the bankrupt) they were yellow in color and were immersed in a solution of sulphur and brine. They were in a raw state, unedible and unpalatable. * * * By a secret process, this sulphur and brine is extracted from the cherries. They are cleaned, washed, pitted and stemmed. The cherries are then put through several processes successively, by means of which the cherries are sweetened, flavored, colored and preserved. In doing this numerous ingredients are used, namely, sugar, Marasque waters flavors, etc. * * * The cherry is changed from an unpalatable, unedible, raw, yellow cherry, to a palatable and edible * * * cherry."

This finished article was formerly sold to the trade as "Maraschino cherries." They were not, however, and never had been Maraschino cherries, and under the requirements of the Pure Food & Drug Act, the bankrupt changed the name to "Maraschino flavored cherries" where the Maraschino flavor was used, and simply "cherries," "whole cherries," "fine cherries" or some such term, when other flavors were used.

In short the bankrupt bought cherries preserved in brine and sulphuric acid, extracted the preservative, stemmed, pitted, sweetened, colored, flavored and preserved them and sold them as cherries.

The bankrupt did not manufacture any of the flavoring or coloring or sweetening articles used by it. And we have seen that labor alone expended on an article does not constitute manufacturing. So then, in order to hold that this business was manufacturing, we must find that the above process "effected some transformation in the character of the cherries and converted them into a new and different article, having a distinctive name, character or use."

"They were still cherries," and necessarily still had the same character and use.

I therefore find that the bankrupt was not a manufacturing establishment. The exceptions Nos. 8 and 9 are sustained, and all claims claiming a lien under the Kentucky Statute above referred to are disallowed as lien claims, but may remain on the files as unsecured claims.

Witness my hand at Covington in said district this 18th day of November, A. D. 1912.

Martin M. Durrett,
Referee in Bankruptcy.

PETITION TO REVIEW AN ORDER OF THE REFEREE.

(Filed Nov. 29, 1912.)

Now come George Lueders & Company, a corporation organized under the laws of the State of New York, and G. S. Nicholas & Company, a firm doing business in the State of New York, creditors whose claims have been duly filed herein for a lien under and by virtue of Sections 2487 to 2491 of the Kentucky Statutes, and on behalf of themselves and all other creditors who have filed similar claims, respectfully represent:

1. That prior to February 19, 1912, The I. Rheinstrom & Sons Company was engaged in business at Ludlow, Kentucky; that on or about the 19th day of February, 1912, a petition in bankruptcy was filed against said company, and on the 12th day of April, 1912, said company was duly adjudged a bankrupt by order of this court.

2. That on or about the 6th day of May, 1912, G. S. Nicholas & Company filed their claim against said bankrupt estate for Sixteen Hundred and Sixteen and 17/100 ($1616.17) Dollars, and George Lueders & Company filed their claim for Fifteen Hundred and Sixty-nine and 33/100 ($1569.33) Dollars, both of which said claims were for materials and supplies furnished to said bankrupt for the purpose of carrying on said bankrupt's business; that under and by virtue of Sections 2487 to 2491 inclusive of the Kentucky Statutes, your petitioners claimed a lien upon so much of said bankrupt's property and effects as were involved in its business and all the accessories con-

nected therewith including the interest of said bankrupt in real estate used in carrying on its business; that other creditors who had similar claims and on whose behalf this petition is also filed, had, on divers dates, duly filed their claims against said estate for a lien under and by virtue of the Statutes hereinbefore referred to.

3. That on or about the 31st day of August, 1912, the Central Trust Company of Illinois, a general creditor of the bankrupt, filed objections to the granting or allowance of any such lien as was claimed by your petitioner and the other creditors on whose behalf this petition is filed, setting forth some twenty-one (21) causes of objection, of which those numbered eight (8) and nine (9) were as follows:

"8. That the property and effects which passed into the hands of the Receiver, heretofore appointed and discharged by this court, and now in the hands of the Trustee for the benefit of creditors, are not the property or effects of any mine, railroad, turnpike, canal or other public improvement company, or of any owner or operator of any rolling mill, foundry or other manufacturing establishment, as in said statute provided."

"9. That the business carried on by said bankrupt, is not, and has not at any time, been the business of any mine, railroad, turnpike, canal or other public improvement company, or of any rolling mill, foundry or other manufacturing establishment."

That the matter came on to be heard before Martin M. Durrett, Referee in said estate, upon the arguments of counsel and upon certain testimony introduced by your petitioners; that the said Referee, on or about the 20th day of November, 1912, entered an order sustaining the objections numbered eight (8) and nine (9) hereinabove set forth, and disallowed the claims of your petitioners and those other creditors claiming a lien under the Kentucky Statutes above referred to as lien claims.

4. That your petitioners claim that the property of the said bankrupt now in the hands of the trustee, was the property or effects of a manufacturing establishment, and that the claims of your petitioners were for materials and supplies furnished to said bankrupt for the carrying on of its business as a manufacturing establishment, and that therefore the claims of your petitioners are entitled to a lien upon so much of such property and effects as may have been involved in such business, and all the accessories connected therewith, including the interest of the

bankrupt company in the real estate used in carrying on such business.

5. Your petitioners therefore aver that the said Referee erred in making an order disallowing said lien of your petitioners and those creditors in whose behalf this petition is filed; that the said Referee should have made an order allowing said liens and holding that said petitioners were entitled to said liens by virtue of Section 2487 of the Kentucky Statutes.

6. That your petitioners desire a review by the judge of this court of the order made by said Referee, and file this petition therefor and they therefor pray that the questions of law and fact raised before the Referee and decided by him, may be certified by the said Referee to the Honorable A. M. J. Cochran, District Judge, that he may review the order heretofore made and make and enter an order or direct the Referee to make and enter an order holding and deciding that your said petitioners are entitled to a lien to the amount of their respective claims, as set forth in their proofs of debt on all the property and effects of such bankrupt as may have been involved in such business, and all the accessories connected therewith including the interest of such bankrupt in the real estate used in carrying on such business.

DeCamp & Sutphin,
Attorneys for George Lueders & Co. and
G. S. Nicholas & Company.

PETITION TO REVIEW REFEREE'S ORDER.

(Filed Nov. 30, 1912.)

To Honorable Martin M. Durrett. Referee in Bankruptcy:

Come now The D. A. White Company, a corporation organized and existing under and by virtue of the laws of the State of Ohio, and doing business in the City of Cin-

cinnati, County of Hamilton, and State of Ohio; The E. Berghausen Chemical Company, a corporation organized and existing under and by virtue of the laws of the State of Ohio, and doing business in the City of Cincinnati, County of Hamilton, and State of Ohio; The E. A. Conkling Box Company, a corporation organized and existing under and by virtue of the laws of the State of Ohio, and doing business in the City of Cincinnati, County of Hamilton, and State of Ohio; T. A. Decker, of the City of Chicago, County of Cook, and State of Illinois; B. F. Goodrich Company, a corporation organized and existing under and by virtue of the laws of the State of New York and doing business in the City of Akron, County of Summit, and State of Ohio, and Hazel-Atlas Glass Company, a corporation organized and existing under and by virtue of the laws of the State of West Virginia, and doing business in the City of Wheeling, County of Ohio, and State of West Virginia, and respectfully represent that they are creditors of the estate of The I. Rheinstrom & Sons Company, Bankrupt, having claims as follows:

The D. A. White Company	$9,121.02
The E. Berghausen Chemical Co.	642.41
The E. A. Conkling Box Co.	1,293.28
T. A. Decker	1,114.72
B. F. Goodrich Company	300.92
Hazel-Atlas Glass Company	3,510.94

That said claims were duly filed in this proceeding on the 16th day of May, 1912, on which date said claims were allowed as general unsecured claims against the bankrupt estate.

That the claims of your petitioners were for materials and supplies furnished to the Bankrupt for the purpose of carrying on said Bankrupt's business, and under and by virtue of Sections 2487 to 2491 inclusive of the Kentucky Statutes, your petitioners claim a lien upon so much of said Bankrupt's property and effects as were involved in its business, and all of the accessories connected therewith, including the interest of said Bankrupt in real estate used in carrying on its business.

That on the 18th day of November, 1912, an order, a copy of which is hereto annexed, marked "Exhibit A" and made part of this petition, was made and entered herein:

That such order was, and is, erroneous in that the court found,

AS TO QUESTIONS OF FACT

First: That "the Bankrupt did not manufacture any of the flavoring or coloring or sweetening articles used by it."

Second: That the cherries which were received by the Bankrupt in a raw state, unedible and unpalatable, and which were, by various processes, cleaned, washed, pitted, sweetened, flavored, colored and preserved, "were still cherries and necessarily still had the same character and use."

AS TO CONCLUSIONS OF LAW

First: That the business in which The I. Rheinstrom & Sons Company was engaged was not that of a manufacturing establishment.

Second: That the claims of your petitioners and of other creditors having claims of a similar character, were not entitled to priority under Sections 2487 to 2491 inclusive of the Kentucky Statutes.

Wherefore, your petitioners, feeling aggrieved because of such order, pray that the same may be reviewed, as provided in the Bankruptcy Act of 1898 and General Order XXVII.

The D. A. White Company,
The E. Berghausen Chemical Co.,
The E. A. Conkling Box Company,
T. A. Decker,
B. F. Goodrich Company,
Hazel-Atlas Glass Company,
By Burch, Peters, Oppenheimer & Connolly,
Their Attorneys.

Dated: November 30th, 1912.

State of Ohio, Hamilton County, ss:

Edward F. Peters, of lawful age, being first duly sworn according to law, deposes and says:

That he is a member of the firm of Burch, Peters, Oppenheimer & Connolly, attorneys of record for The D. A. White Company, The E. Berghausen Chemical Company, The E. A. Conkling Box Company, T. A. Decker, B. F. Goodrich Company and Hazel-Atlas Glass Company, creditors of The I. Rheinstrom & Sons Company, Bankrupt; that he has read the within and foregoing petition for review and is familiar with the facts therein set forth; that he is duly authorized to make this affidavit; and that

the facts set forth in the within and foregoing petition for review are true, as he verily believes.

Edward F. Peters.

Sworn to before me and subscribed in my presence this 30th day of November, 1912.

Paul V. Connolly,
Notary Public, Hamilton County, Ohio.

EXHIBIT "A."

Various creditors of the bankrupt filed claims against the estate, in which they claim a lien thereon. The claim for a lien is based on the allegation that, articles composing the claims were materials and supplies furnished by the claimants to the bankrupt for the carrying on of its business, and that the bankrupt was such manufacturing establishment as is affected by section 2487 of the Kentucky Statutes.

That statute is as follows:

"When the property or effects of any (mine), railroad, turnpike, canal or other public improvement, company, or of any owner or operator of any rolling mill, foundry or other manufacturing establishment, whether incorporated or not, shall be assigned for the benefit of creditors shall come into the hands of any executor, administrator, commissioner, receiver of a court, trustee or assignee for the benefit of creditors, or shall in any wise come to be distributed among creditors, whether by operation or law or by the act of such company, owner or operator, the employes of such company, owner or operator in such business, and the persons who shall have furnished materials or supplies for the carrying on of such business shall have a lien upon so much of such property and effects as may have been involved in such business, and all the accessories connected therewith, including the interest of such company, owner or operator in the real estate used in carrying on such business. (The amendment of March 23, 1894, inserted "mine" in first line.)

The trustee and Central Trust Company of Illinois, creditor, jointly filed exceptions to the allowance of any of these claims as secured.

Their bill of exceptions is as follows:

1. That the claim for which such lien is asserted filed herein, does not comply in substance or in form with the statute in such case made and provided, and is insufficient to entitle said claimant to any benefit thereof.

2. That said claim has not been filed in the manner and within the time by said statute required.

3. That no suit has been filed to enforce said lien, as in said statute provided.

4. That said claim for said lien, filed herein, is vague, indefinite, uncertain and void, in that it does not state what materials or supplies were furnished by said claimant, as in said statute provided.

5. That said claim for said lien, filed herein, is vague, indefinite, uncertain and void, in that it does not state for what purpose the materials or supplies were furnished, by said claimant, as in said statute provided.

6. That the goods, merchandise or wares furnished by said claimant to said bankrupt do not constitute such "materials or supplies" as to entitle said claimant to any lien whatever, by virtue of the said statute, or otherwise.

7. That said claim for said lien is vague, indefinite, uncertain and void, in that it does not state upon what property and effects the alleged lien is claimed, as in said statute provided.

8. That the property and effects which passed unto the hands of the receiver, heretofore appointed, and discharged by this court, and now in the hands of the trustee for the benefit of creditors, are not the property or effects of any mine, railroad, turn-pike, canal or other public improvement company, or of any owner or operator of any rolling mill, foundry or other manufacturing establishment, as in said statute provided.

9. That the business carried on by said bankrupt is not, and has not at any time been the business of any mine, railroad, turn-pike, canal or other public improvement company, or of any rolling mill, foundry or other manufacturing establishment.

10. That said claim for said lien does not state that the title to said materials and supplies passed from said claimant to said bankrupt in the State of Kentucky and that, therefore, no lien under and by virtue of said statute can arise on account or by reason of the furnishing of said materials and supplies.

11. That said claimant is not a citizen or resident of the State of Kentucky, or engaged in business in said state, nor incorporated under the laws of said state, and is, therefore, not entitled to the rights or benefits conferred by said statute.

12. That said statute is unjust, discriminatory and void, in that it favors creditors to certain companies and establishments and does not similarly favor creditors of

other companies and establishments, without any reasonable basis or justification for such discrimination.

13. That said statute is unjust, discriminatory and void, in that it deprives creditors, other than those who have furnished materials or supplies for the carrying on of the business of the bankrupt, of their property without due process of law.

14. That said statute is unjust, discriminatory and void, because it impairs the rights of judgment creditors.

15. That said statute is unjust, discriminatory and void, because it creates a secret lien.

16. That said statute is unjust, discriminatory and void, because it is contrary to the public policy of the State of Kentucky.

17. That said statute is unconstitutional and void, because it is contrary to the provisions of and in conflict with the United States bankruptcy law, entitled "An Act to establish a uniform system of bankruptcy throughout the United States," of July 1, 1898, and the amendments thereto.

18. That, by reason of the provisions of said United States bankruptcy law, said claimant is not entitled to said lien.

19. That the Act of February 25, 1893, as amended, is unconstitutional and void, in that it is contrary to the provisions of Section 51 of the constitution of the Commonwealth of Kentucky.

20. That said statute is unconstitutional and void, because it is contrary to and in conflict with the provisions of the constitution of the Commonwealth of Kentucky.

21. That said statute is unconstitutional and void, because it is contrary to and in conflict with the provisions of the constitution of the United States.

22. That the acceptance by said claimant of a note or notes in payment of the indebtedness of said bankrupt to said claimant, is a discharge and release of such lien and any claim thereto, and constitutes a full and complete waiver of such lien.

23. That said claimant is a foreign corporation doing business in Kentucky without license or authority, and that on account thereof said claimant is not entitled to the benefit of said statute, or any lien under or by virtue thereof.

At a preliminary hearing, I held that some of the claims were not specific enough, in that they did not show what the articles were on which they were based; and therefore it could not be determined whether or not the

articles were "materials and supplies" for the carrying on of the business. I gave the claimants leave to amend, which was done. Counsel practically limited their arguments and briefs to specifications Nos. 8 and 9 of the bill of exceptions.

In view of what follows, it seems to me that the solution of the questions thereby raised renders it unnecessary to further advert to the other specifications.

It was very earnestly contended by counsel that if the bankrupt was a "manufacturing establishment," it was not such as was contemplated by the statute supra. They contended that the words "or other manufacturing establishment" as used in the statute should be construed under the doctrine of ejusdem geneis. Counsel cite many authorities which seem to support their contention: but, without taking them up, it seems to me, their contention can not be sustained because the statute has been construed by the Kentucky Courts to apply to such other manufacturing establishment as must have been excluded if that doctrine had been applied.

Thus in Hall & Son vs. Guthrie Sons, Assignee, 31 Ky. Law Rep. 801 the statute was held applicable to a flouring mill, and to a sawmill in Graham vs. Magann Lumber Co. 118 Ky. 192, and Bogard vs. Tyler, Adm. etc. 21 Ky. Law Rep. 1452 and to an establishment manufacturing a cyt-off for a cistern in Winter vs. Howell, Assignee, 109 Ky., 163. It is objected that in Bogard vs. Tyler the construction of the statute was not necessary to the determination of the court. But the court did construe the statute and said:

"There must be a manufacturing establishment, and under the evidence in this case, as the sawmill was engaged in manufacturing lumber for the market we think there was."

This construction has been followed by this court. In re: Bennett, 153 Fed. 673, the statute was applied to the business of manufacturing barrels; and to the manufacture of shirts in Falls City Shirt Mfg. Co. 98 Fed. 592; and to the manufacture of saddles and harness in Stark-Ullman Saddlery Co., 171 Fed. 834.

I now take up the question as to whether or not the bankrupt's business was a "manufacturing establishment."

If it was not, no other point need be raised or considered; and the exceptions must be sustained.

The word manufacture means literally, to make by hand. Worcester, in his dictionary, says "lexicographers define manufacture to be the process of making anything

by act, or reducing materials into a form fit for use by the hand or by machinery."

The Standard Dictionary has it "the making of wares or other products by hand, machinery, or by other agencies."

Webster defines it "to make or fabricate from raw materials by the hand, by act, or machinery, and work into forms convenient for use." z. "to work raw materials into suitable forms for use."

Counsel agree to the definition of the word in the City of Memphis vs. St. Louis & S. F. R. Co., 183 Fed., 529, where the court held that the mere fact of the application of labor to an article, does not in itself make it a manufactured article, unless the application of such labor effects some transformation and converts it into a new and different article, having a distinctive name, character or use.

This definition was evidently adopted from the case of Hartrauft vs. Wiegmann 121 U. S. 609. In this case the question was whether shells in which the epidermis is first cleaned off, and then are ground or polished by an emery wheel and acid, to expose the pearly interior. The court holding they were not manufactured, said:

"They were still shells. They had not been manufactured into a new and different article, having a distinctive name, character or use, from that of a shell."

The question is, did the bankrupt's business come within the above definitions and constructions?

The bankrupt purchased cherries in Italy which were picked with the stems on shortly before they were ripe, immersed in a solution of brine and sulphur and packed in casks. I now quote from the brief of counsel for claimants, page 4:

"When these cherries came to them (the bankrupt) they were yellow in color and were immersed in a solution of sulphur and brine. They were in a raw state, unedible and unpalatable. By a secret process this sulphur and brine is extracted from the cherries. They are cleaned, washed, pitted and stemmed. The cherries are then put through several processes successfully, by means of which the cherries are sweetened, flavored, colored, and preserved. In doing this numerous ingredients are used, namely, sugar, Marasque water flavors, etc. The cherry is changed from an unpalatable, unedible raw yellow cherry, to a palatable and edible cherry."

This finished article was formerly sold to the trade as "Maraschino cherries." They were not, however, and

never had been Maraschino cherries, and under the requirements of the Pure Food and Drug Act, the bankrupt changed the name to "Marschino flavored cherries," where the Maraschino flavor was used, and simply "cherries," "whole cherries," "fine cherries," or some such term, when other flavors were used.

In short the bankrupt bought cherries preserved in brine and sulphuric acid, extracted the preservative, stemmed, pitted, sweetened, colored, flavored, and preserved them and sold them as cherries.

The bankrupt did not manufacture any of the flavoring or coloring or sweetening articles used by it. And we have seen that labor alone expended on an article does not constitute manufacturing. So then, in order to hold that this business was manufacturing, we must find that the above process "effected some transformation in the character of the cherries and converted them into a new and different article, having a distinctive name, character or use."

"They were still cherries," and necessarily still had the same character and use.

I therefore find that the bankrupt was not a manufacturing establishment. The exceptions Nos. 8 and 9 are sustained, and all claims claiming a lien under the Kentucky Statute above referred to are disallowed as lien claims, but may remain on the files as unsecured claims.

Witness my hand at Covington in said district this 18th day of November, A. D. 1912.

(Signed) M. M. Durrett,
Referee in Bankruptcy.

OPINION OF COURT.

(Entered June 16, 1913, by A. M. Cochran, Judge.)

This case is before me on petition of eight creditors of the bankrupt, who claim priority over the other creditors under Sections 2487 to 2491, inclusive, of the Kentucky Statutes, by virtue of Section 64 b(5) of the Bankrupt Act, for review of an order of the referee denying them such priority. The bankrupt owned and operated an establishment at Ludlow, Kentucky, in this district, where it produced what are known as "Maraschino Cherries," and the debts of the petitioning creditors were for materials and supplies furnished for the purpose of carrying on its business. The provisions of those sections of the Kentucky Statutes under which priority is claimed may be found set forth in full in my opinion in the case of In re Bennett, 153 Fed., 680. The right thereto depends solely on the question whether or not the bankrupt was the owner or operator of a manufacturing establishment within the meaning of Section 2487. That is the only question which has been presented and argued before me. It is claimed by the trustee and creditors, other than petitioners, that it was not the owner or operator of such an establishment, and the referee so held. Under that Section and Section 2491, in certain contingencies, the employees of and persons furnishing, for the purpose of carrying on its business, materials and supplies to "any mine, railroad, turnpike canal or other public improvement company" or "any owner or operator of any rolling mill, foundry or other manufacturing establishment" acquires a lien on its property and effects.

The position of the trustee and objecting creditors is twofold. They contend that the bankrupt was not the owner or operator of a manufacturing establishment at all, and that, if it was, it was not the owner or operator of the kind of a manufacturing establishment covered by the statute. They contend that it does not cover every kind of a manufacturing establishment, but only such manufacturing establishments as are like the two specified, towit; rolling mill and foundry, and the bankrupt's establishment was not of such character. The referee based his holding on the first branch of the position, i. e. that the bankrupt's establishment was not a manufacturing establishment at all.

The problem in hand, therefore, is one of interpretation —the ascertainment of the thought of the legislature of Kentucky as to the character of establishment necessary to bring the owner or operator thereof within the statute. What kind

of an establishment did it have in mind when it used the words "other manufacturing establishment." Generally such a question is stated to be concerned with the intent of the legislature or the spirit of the legislation. I prefer to put it as having to do with the thought of the legislature.

It is urged on behalf of the respondents that this statute should be strictly construed. By this I understand to be meant that it must clearly appear that the bankrupt's establishment was such an establishment as the legislature had in mind in enacting the statute; otherwise the claim to priority should be denied. I accede to the soundness of this position, particularly as from my experience with it, in the Bennett case, I have found that it is capable of working a very great hardship. In that case foreign material men, who did not know that they were entitled to priority until after bankruptcy, took the entire estate and local banks, who, in like ignorance, had furnished money not only to buy material, but to pay the employees and by so doing had aided materially in keeping the concern on its feet, for many months, went without anything. But if the bankrupt's establishment comes clearly within the statute I have no other recourse than to sustain the claim to priority.

In the argument before me the last branch of respondents' position, i. e. that the legislature did not have in mind any manufacturing establishment, but only such establishments as were like the two specified, and the bankrupt's establishment, assuming it to have been a manufacturing establishment at all, was not such an one, has been put to the front. It seems to me, however, that it is more logical to deal first with the other branch of respondents' position, assuming for the time being that the legislature had in mind any such establishment, and I shall pursue that course. In so doing I think best at the outset to come to an understanding as to two matters. One is as to what bankrupt did at its establishment, and what were the so-called "Maraschino Cherries" which it produced thereat. The other is as to respondents' argument in favor of the position that its establishment was not a manufacturing establishment.

What the bankrupt did at its establishment had to do with natural cherries in a certain condition. The cherries were large, whitemeated, freestone cherries. They had been grown in the North of Greece or Italy; then picked just before reaching the ripened stage, i. e. as they began to turn, with their stems attached; then treated with sulphuric acid to bleach them, the color produced thereby being white or light brown; and finally immersed in brine and a percentage of sulphuric acid in casks or barrels to preserve them, in which condition they were purchased by the bankrupt. There were ten dis-

tinct stages in what it did to them after they had been received at its establishment. It first drained off the brine and sulphuric acid; then washed the cherries in various changes of water to remove all traces of the brine and acid; then stemmed them by hand; then pitted them by machinery; then washed them again in various changes of fresh water to remove any brine or acid which might have gotten under the skin in stemming and pitting; then colored them by immersing them in a solution of coloring matter and water; then sweetened them by immersing them in a syrup made of cane sugar and water, contained in a vacuum kettle within an open kettle containing water and, whilst in this condition, keeping the water in the outer kettle hot for twelve hours, and then converting that kettle into a vacuum kettle, also, and keeping the water therein boiling for twenty-four to forty-eight hours, this operation being termed the cooking operation, then flavored them by adding to the syrup such flavoring substance as might be desired; then sorted and graded them; and finally bottled them with the syrup thus flavored. It does not appear what was the original name of the cherries so purchased and treated. It was not Maraschino. There is a cherry of that name grown in the mountains of Dalmatia in Austria, but they were not such cherries: Amongst the substances with which some of them were flavored was what is termed real Maraschino water made from the real Maraschino cherries and with which others were flavored was what is termed Marasque water made from cherries grown in Southern France, an imitation of the real Maraschino water. The cherries so treated were given two colors, red and green. The red ones are characterized as luscious, big red cherries, and up to the year 1911 had been labelled "Maraschino Cherries" and that was the name by which they were popularly known. In that year, under the Pure Food and Drug Act, it was forbidden to so label them. Thereafter they were labelled simply as cherries. It was stated that that they were artificially colored and, if flavored with real Maraschino water, that also was stated. It is not likely that this change in the label has to any extent affected the name by which they are popularly known. It is testified that it has not affected their sale. The referee has put the bankrupt's connection with these articles, to which I have given so much detail, in a single sentence. He says;

"In short, the bankrupt bought cherries, preserved in brine and sulphuric acid, extracted the preservative, stemmed, pitted, sweetened, colored, flavored and preserved them and sold them as cherries."

The principal, if not only, use to which these cherries are put is as a garnish in various mixtures of alcoholic liquor, in

salads, ice cream and desserts. Their flavor is not that of the original cherry, not even of the real Maraschino cherry.

The argument of respondents' counsel in support of the position that the bankrupt's establishment is not a manufacturing establishment hardly deals with the subject as a matter of principle. They rely on certain decisions, some from noncontrolling jurisdictions and others from controlling jurisdictions. Those from controlling jurisdictions are by the Court of Appeals of Kentucky, the Sixth Circuit Court of Appeals, and the Supreme Court of the United States. It must be conceded that the decisions of any one of these three courts, if in point, is binding on me. I have no right to do otherwise than follow it whether I deem it sound or not. I deem it important to make a rather full presentation of these decisions. Those from noncontrolling jurisdictions will be noted first. Two decisions from the Supreme Court of Louisiana are much relied on. They arose under the Constitution of that State exempting manufacturers from a certain tax. They were in the cases of City of New Orleans vs. Mannesier, 32 La. Ann., 1075, City of New Orleans vs. New Orleans Coffee Co. Ltd., 86 La. Ann., 86.

In the Mannesier case it was held that one who produced ice cream in an establishment equipped with steam engines and other complicated apparatus and with the aid of a large force of workmen was not a manufacturer. In the course of the opinion it was said;

"We are told that any one seeing the steam engine and complicated apparatus and large force needed to produce defendant's goods, would at once conclude that he is a manufacturer. With as much force it might be said that any one visiting the mammoth kitchen of the Grand Union Hotel at Saratoga, together with their myriads of employees, and their colossal apparatus, would at once magnify the cooks and pastrymen into manufacturers."

In the New Orleans Coffee Co. Ltd. case it was held that a corporation which purchased green coffees, divided them, by a secret process, for the production of different brands suitable to different tastes and recognizable from each other, roasted them carefully and cleanly, cooled them by another secret process, and in this condition put them on the market was not a manufacturing corporation. It used no chemicals and did not grind the coffee.

Judge Parlange said;

"We are satisfied that the defendant corporation does not claim that it is a manufacturer by reason of grinding the

coffee and thereby changing its form, * * Its claim to be a manufacturer is based wholly on the production of brands of unground roasted coffee. * * We are to decide whether the defendant corporation is a manufacturer on the tangible results of the manipulation to which they subject green coffees, bearing in mind the assertion of the defendant corporation that it uses no chemicals and that the coffee after the manipulation is still pure coffee. The defendant corporation virtually admits that a coffee roaster is not a manufacturer, but denies that such a designation can properly be applied to it. A 'coffee roaster' is testified by the witnesses for the defendant corporation to be a person 'who takes a sack of coffee and simply puts it in a roaster and turns that coffee out after it is roasted.'"

Again he said;

"It is not every employment of labor which will make the thing upon which it is employed a manufacturer. It has been held that the great and laborious pursuits of mining and shipbuilding are not manufacturing occupations."

In referring to the ice cream case he said;

"In that case this court said that the mammoth kitchen of a hotel is not a manufactory, yet the confectionery and kitchen yield products in which the identity of the articles from which they are made is almost lost."

In distinguishing the decision of that court in the case of In re Ernst, 35 La. Ann., 746, which arose between the case then in hand and the ice cream case, in which is was held that a rice miller was a manufacturer, he said;

"To clean rice, a long and laborous process is required; a large and expensive plant, including powerful and complicated machinery is necessary, and from the 'paddy' several marketable by-products are obtained besides the clean rice."

The first of the two decisions of the Supreme Court of the United States relied on and hereafter presented was cited in support of the position taken.

Then comes the decision of the Supreme Judicial Court of Massachusetts in the case of Hittinger vs. Westford, 135 Mass., 258. It was there held that a steam engine, boiler, machinery and tools used in houses, located on the shores of two large ponds, to cut and remove from the ponds and store in the house ice, which formed on the ponds during the winter time, by a person who sold same at wholesale in large quantities for export and use in Massachusetts and other states was not machinery employed in a "branch of manufactures" under a tax statute. Judge Colburn said;

"The cutting of ice produced by the agencies of nature on the surface of a pond, into pieces convenient for handling, and storing the pieces in a building, cannot in any proper sense be called a manufacture. The material is in no way changed or adapted to any new or different use; it still remains ice; it is no more a manufacture than the putting of the water from the pond into casks for transportation and use would be manufacture, or the mining of coal which has been decided not to be a manufacture. Byers vs. Franklin Coal Co., 106 Mass., 131. It is like the harvesting of hay or grain or other agricultural crops, and the analogy is so strong and obvious that the 'ice crop,' the 'ice harvest' and 'harvesting ice' are terms in common use."

Then come three decisions of the Court of Appeals of New York in the case of People vs. Knickerbocker Ice Co., Ex rel. Union Pacific Tea Co., 99 N. Y., 181, People vs. Roberts, Ex rel. New England Dressed Meat & Wool Co., 145 N. Y., 375, People vs. Roberts, 155 N. Y., 53. The Knickerbocker Ice Co. case is just like the Massachusetts case first considered. It involved the question whether a corporation engaged in the business of collecting ice from the Hudson River and Richland Lake, storing, preserving and preparing it for sale, transporting it to the city of New York and vending it there was a manufacturing corporation under a statute exempting such corporations from taxation. It was held that it was not. No reference was made to the earlier Massachusetts case. Judge Danforth said;

"Its dealing is with ice as an existing article, not the manufacture or production of ice by combination of materials, or the application of forces or otherwise. It collects, stores and preserves that which natural causes created and which other natural causes would destroy and waste. It seeks only to hold these last in check. Similar operation would equally apply to water, fruit, sand, gravel, coal and other natural productions. Water might be improved by filtration; fruit by judicious pruning of the tree or vine, or protection by glass; sand and gravel by screening; cobble stones by selection; and coal by breaking; and each by various processes stored until the season of demand when * * the natural article and no other would be put upon the market. No doubt ice may be manufactured and frigorific effects produced by artificial means. Corporations exist for that purpose and come literally within our manufacturing laws. Their methods in no respect resemble those of the defendant. Its tools and implements are for convenience in handling and marketing a product, and not at all for making it."

In referring to certain cases cited in support of the contention that the defendant was a manufacturing corporation and in distinguishing them from the one in hand Judge Danforth said;

"They all, so far as they have any application, require the production of some article, thing or object by skill or labor out of raw material, or from matter which has already been subjected to artificial forces, or to which something has been added to change its natural conditions."

The Union Pacific Tea Company case is like the Louisiana Coffee case, but goes it one better. The question involved was whether a corporation which purchased tea in its original state, mixed various kinds together and produced a compound which was called a combination tea and purchased, also, coffee in the raw bean, roasted and ground it and in some instances mixed different kinds of coffee together, forming, as in the case of tea, a combination article, was a manufacturing corporation so as to be exempt from taxation. It was held that it was not. Here the coffee was ground. In the Louisiana case it was not and point was made of this in that case. Here too the first of the two decisions of the Supreme Court of the United States relied on and hereafter considered was cited as authority for the position taken. And the only other authority relied on was its earlier decision in the ice case just considered.

Judge Bartlett said;

"We think it very clear that the handling of tea and coffee in the manner indicated is not 'manufacture' in any legal sense, and the relator cannot be regarded as a manufacturing corporation. Mr. Webster defines 'manufacture' to be 'anything made from raw materials by the hand, by machinery, or by art, as cloths, iron utensils, shoes, machinery, saddlery &c.' The process of manufacture is supposed to produce some new article by the application of skill and labor to the raw material. It is quite apparent that the processes of relator, when subjected to this test, cannot be deemed 'manufacture' either in the ordinary or legal definition of that term."

The New England Dressed Meat & Wool Company case involved the question whether a corporation operating a slaughter house was entitled to the exemption as a manufacturing corporation. The nature of the corporation's business was thus set forth by Judge Martin;

"Briefly stated, the principal business carried on by the relator was the purchasing of sheep and lambs, slaughtering them, pulling the wool from the hides or pelts, selling it, selling the hides, taking from the animals the offal, including the blood and legs, converting it into fertilizer, and then reducing

the carcasses to a temperature which would retard decomposition and shipping them to the place of delivery in refrigerator cars."

He stated the conclusion of the court in these words;

"We think this does not constitute 'carrying on manufacture' within the spirit and meaning of the statutes. The business conducted by the relator was obviously that of purchasing, slaughtering and selling sheep and lambs. While it utilized the hides, the wool, the tallow and the offal, as well as the carcasses of these animals, yet, to say that refrigerated mutton, rendered tallow, pulled wool, or untanned hides were manufactured articles would be quite incorrect. The words of a statute are to be given their natural, plain, obvious and ordinary signification. To say that the relator was engaged in manufacturing mutton, wool, hides or tallow would not be giving to the words 'manufacture' or 'manufacturers' their ordinary and plain meaning. It may be that the fertilizer might be regarded as a manufactured article, but that was not the principle business in which the relator was engaged, but was a mere incident to it. Manifestly none other of these articles was manufactured. At most they were merely prepared for market and preserved until sold. We are clearly of the opinion that the relator was not a manufacturing corporation, nor engaged in 'carrying on manufacture' in this state, within the spirit and meaning of the statutes."

The only authorities relied on in support of the conclusion reached were the court's previous decisions in the natural ice and coffee cases heretofore considered.

Finally comes a decision of Judge Blatchford, just before his elevation to the Supreme Court Bench, in the case of Frazee vs. Moffitt, 18 Fed., 584. The question there involved was whether hay in bales imported from Canada was an "unmanufactured" article or a "manufactured" article within the tariff laws. It was held that it was an "unmanufactured" article. Judge Blatchford stated the contention of the defendant who was claiming it to be a "manufactured" article to be;

"That hay is a new article transformed from grass, as much as sugar is from the cane juice or the maple sap, or as salt is from the saline brine; and that the heat of the sun and the air and human skill and labor manufacture the grass into hay."

In answer to this contention he said;

"Many articles are properly called raw which have under gone some manipulation. Cotton is picked from the bolls, and cleaned by ginning, and baled. Yet it is raw cotton in the bale. Wheat is cut, and the grains are threshed out, and then subjected to a cleaning machine, and then bagged, yet it is raw

wheat in the bag. So with other grains. The cotton and the grains undergo such change and preparation as exposure to light, and natural or artificial heat, and air, and the manipulation they receive, produce or allow, be it more or less. Yet neither the cotton nor the grains would be said to be manufactured. Salt and sugar are new articles. Cotton and grains are the same articles they were when on the plant with its roots in the ground. So hay is the same article it was when it was stalks of grass with roots in the earth. It is dried, to be sure, but the drying and any conversion of starch into sugar are mere incidents of the necessary cutting to enable it to be stored for food in latitudes where grass cannot be found all the year round. Where it can be so found no hay is stored. Dried apples would not be called a manufactured article, though the apple is peeled and cored and sliced, and dried by exposure to the sun and manipulation. The substance of dried apples is still apples. The substance of dried grass or hay is still grass. Change of name and manipulation do not necessarily constitute manufacture within the meaning of Section 2516. Each case must be decided according to its own circumstances."

These seven decisions are all that are cited and relied on coming from noncontrolling jurisdictions.

I come now to those from controlling jurisdictions. They are, two from the Kentucky Court of Appeals, one from the Sixth Circuit Court of Appeals, and two from the Supreme Court of the United States. The Kentucky decisions are those in the cases of Muir vs. Samuels, 110 Ky., 605, Standard Tailoring Co. vs. City of Louisville, 153 S. W., 764. The Muir case involved the question whether a laundry company was the owner or operator of a "manufacturing establishment" under the statute involved here. It was raised by certain laborers claiming a lien on the laundry under that statute. It was held that it was not. Judge Burnam said;

"The only business of a laundry is to transform soiled into clean linen. It is true that this is done largely by means of machinery and requires the use of an engine and boilers and other appliances ordinarily used in manufacturing establishments but after all nothing new is produced."

He then cited the Massachusetts ice case and the Louisiana ice cream case and concluded as follows;

"We are, therefore, inclined to the opinion that a laundry cannot be considered a manufacturing establishment in contemplation of the statute."

The Standard Tailoring Company case was decided but recently. It involved the question whether that Company operated a manufacturing establishment in the city of Louisville so as to be entitled to exemption from municipal taxa-

tion for five years under an ordinance thereof granting such exemption to such establishments. The business in which the Company was engaged was that of making up men's clothing for the trade, pursuant to sales from samples distributed among local dealers. It was held that it was not a manufacturing establishment.

Judge Carroll said;

"The words 'manufacturing establishment' have been given a variety of meanings, depending largely on the circumstances surrounding the case in which they have been used. The result of this is that, although the words have been often defined by the courts, few judicial precedents can be found that may be properly applied to any particular state of facts. Webster defines 'manufacture' to be: 'The process or operation by making wares or any material products by hand, by machinery, or by any other agency; often such process or operation carried on systematically with division of labor and with the use of machinery. Anything made from raw materials by hand, by machinery, or by art, as clothes, iron utensils, shoes, machinery, saddlery.' And this definition in different forms of expression embodies the general idea that may be found in all the cases where the word has come up for construction; but, in applying it to the facts of particular cases in which the construction of ordinances or statutes was involved, the courts, especially in license and exemption cases, have found it necessary, in carrying out the legislative intent in the use of the word, to materially limit the scope of this general definition, which is broad enough to embrace almost every concern that is engaged in the business of changing the nature or quality of articles so that they may be used for whatever purpose they were intended. Indeed we might say that the meaning of the words 'manufacture' and 'manufacturing establishment' has been adapted to meet the varying circumstances arising in the case or class of cases in which it was necessary to define them, so that the intent with which they were used might be accomplished. The purpose of the law-making body in using the words has always been allowed to have controlling weight in the decision of the meaning that should be attached to them, as may be seen by an examination of the number of cases cited in 'Words and Phrases' Vol. 5, title 'Manufacture.'

Keeping in mind then the purpose of this ordinance and the thought that the words should be given such meaning as was reasonably intended in their use, it must be at once manifest that, if this broad definition of Webster should be given to the words as used in this ordinance, there are few establishments, whether large or small, that are engaged in the busi-

ness of converting material from one form into another to make it more convenient or desirable for use that would not be entitled to the benefit of the exemption. The baker, the blacksmith, the carpenter, the shoemaker, the confectioner, the merchant tailor, the milliner, the dressmaker, and scores of others, would escape taxation, although it seems quite obvious that it was not intended by the adoption of this ordinance to exempt from taxation the multitude of concerns that in some way or another are engaged in the business of changing the character of material from one form to another. To give the ordinance the construction contended for would defeat, in place of accomplish, the result intended in its adoption, which was to induce the location in the city of new manufacturing establishments that would bring wealth into the city to increase its revenue when the period of exemption had passed, because the diminution in revenue by the exemption of the large class continually engaged in changing articles or material from one form to another would largely exceed the amount that might be produced as a result of the establishment of new manufacturing establishments. Aside from this, it would work gross inequality in the system of taxation; for example, the merchant tailor and the shoemaker would be exempt from taxation, while their next door neighbors, the clothing merchant and the dealer in shoes, would be taxed. So that, while conceding that under a liberal definition of the words the appellant company might be entitled to the exemption, we are sure that, when interpreted to carry out the legislative intent in granting the exemption, it does not bring itself within the fair or reasonable meaning of the ordinance, to the purpose of which reference should be constantly made in determining the class entitled to the favor of exemption.

We may also with much propriety observe that it would not be either safe or judicious to attempt any more accurate definition of the words 'manufacturing establishments' than may be necessary to a decision of the precise question before us. The meaning that should be given to these words may come up in other cases presenting entirely different states of fact, in which the meaning here ascribed to them would be both inappropriate and unjust, and therefore what we say upon the subject must be understood as referring directly to the question submitted in this record for our decision."

And again he said;

"Counsel for appellant undertakes to make a sound distinction between the business of a merchant tailor and the business the appellant company is engaged in. There is a difference in the amount of business they do and a difference in the manner of transacting it, but this is all. When a customer

wishes to buy a suit of clothes from a merchant tailor, he goes to his place of business, selects the style of goods he wants, the tailor takes his measure, and manufactures, or makes—as you please—a suit of clothes for him out of the goods selected. When a man wishes to get a suit of clothes from the appellant company, in place of going to its business house, he goes to its agent, the country merchant, selects the kind of goods he wants, has the country merchant take his measure and send it to the appellant company, and it makes the suit of clothes as ordered. The merchant tailor probably has a dozen people employed in cutting and making clothes by hand and machine, while the appellant company claims to have 60 employes and a number of machines operated by electricity.

Under this state of facts, if the appellant is entitled to the exemption, it would be clearly an unjustifiable discrimination to deny a like exemption to every merchant tailor in the city of Louisville, and if the merchant tailor in the city were granted the exemption, no good reason could be assigned for not exempting all the milliners, all the dressmakers, all the bakers, all the confectioners, all the shoemakers, all the carpenters, and all the cabinet makers who have places of business in the city, and all other persons who are engaged in converting articles from one form into another; and yet we think it apparent that the most ardent champion of giving this ordinance a liberal construction would not think of extending it to embrace merchant tailors, dressmakers, milliners, and the like."

He cited the Louisiana ice cream case and the court's decision in the laundry case, and also the decision of the Supreme Court of Montana in the case of Montana vs. Johnson, 20 Mont., 367, involving the question whether a merchant tailor was a manufacturer. He quoted from the opinion in that case these words:

"A manufacturer is one who makes or fabricates anything for use, and within the literal definition of manufacturer would come a tailor who works clothes into suits for wear. So, too, a seamstress would be brought within such a definition, for she makes handkerchiefs from linen; and the carpenter who takes raw lumber and prepares it for building a house; and a milliner, who makes and sells bonnets; and a blacksmith, who makes horse shoes or forges iron; and the cook, who makes bread or other articles to use as food; and many other persons, whose pursuits in life demand the working of materials into certain forms. * * * We know of no technical meaning to be given to the word 'manufacture' used in the statute, and it is our best judgment that it should be understood in its popular sense. We therefore would include among the manu-

facturers those who produce goods from a raw state by manual skill and labor, and goods which are commonly turned out of factories, and we would exclude a merchant tailor, who merely cuts and fashions a suit of clothes as ordered by a customer, from cloth purchased elsewhere, and kept to be made up as suits are ordered from him."

The decision of the Sixth Circuit Court of Appeals relied on is that of City of Memphis vs. St. Louis & S. F. R. Co., 183 Fed., 529. In that case it was held that the compress plant of a cotton company was not a "manufacturing plant" under a statute of Tennessee authorizing a railroad company to build lateral roads not exceeding fifteen miles in length extending from their main stem or any branch "to any mill, quarry, mine, manufacturing plant or to the bank of any navigable stream."

Judge Sanford did not attempt to reason the matter out for himself, but viewed it from the standpoint of the decisions. Amongst the decisions cited and relied on were the two natural ice cases, one from Massachusetts and the other from New York, and the two coffee cases, one from Louisiana and the other from New York, the decision of Judge Blatchford in the hay case heretofore considered and the first of the decisions of the Supreme Court of the United States to be hereafter considered. He said;

"While various definitions of the terms 'manufacture' and 'manufacturing plant' are given in the adjudged cases, making it difficult to frame an exact definition of the term 'manufacturing plant' as defined by the unbroken weight of authority, the closest analogy to the precise question now under consideration is to be found in those decisions which hold that the cutting of natural ice on the surface of a pond into pieces of a convenient size for handling, and storing the pieces so cut in a building, is not a 'manufacture' within the meaning of the tax laws, the material being in no way changed, or adapted to any new or different use, but remaining ice, to be used simply as ice (Hittinger vs. Westford, 135 Mass., 258, 262); that a corporation organized to collect, store, and preserve natural ice, prepare it for market and transport and vend it, is not a manufacturing corporation within the meaning of the tax laws, its tools and conveniences being 'for convenience in handling and marketing a product, and not at all for making it' (People vs. Knickerbocker Ice Co., 99 N. Y., 181, 183, 1 N. E., 669); that a corporation engaged in roasting, mixing, and grinding coffee is not a manufacturing company within the meaning of the tax laws (People vs. Roberts, 145 N. Y., 375, 40 N. E., 7; City of New Orleans vs. Coffee Co., 46 La. Ann., 86, 14 South., 502); that marble which has been cut into blocks simply for convenience in transportation is not a

manufactured article within the meaning of the tariff laws (United States vs. Wilson, 1 Hunt, Mer. Mag., 167, 28 Fed. Cas., 724); and that hay which has been pressed into bales ready for market is not a manufactured article within the meaning of the tariff laws, although labor has been expended in cutting and drying the grass and bailing the hay (Frazee vs. Moffitt (C. C.) 20 Blatchf., 267, 18 Fed., 584); these last two cases, it is to be noted, being cited with approval in Hartranft vs. Wiegmann, 121 U. S., 609, 615, 7 Sup. Ct., 1240, 30 L. Ed., 1012.

And so it is held that the mere fact of the application of labor to an article by hand or machinery, does not make it a manufactured article within the meaning of the tariff laws, unless the application of such labor effects some transformation in the character of the article and converts it into a new and different article, having a distinctive name, character, or use. Hartranft vs. Wiegmann, 121 U. S., 609, 615, 7 Sup. Ct., 1240, 30 L. Ed., 1012; Foppes vs. Magone (C. C.), 40 Fed., 570, 572, United States vs. Semmer (C. C.), 41 Fed., 324, 326; Baumgarten vs. Magone (C. C.), 50 Fed., 69, 71."

The two decisions of the Supreme Court cited and relied on by respondents are the case of Hartranft vs. Wiegmann, 121 U. S., 609, cited and relied on by Judge Sanford, and in several of the decisions from noncontrolling jurisdictions heretofore considered, and the recent case of Anheuser Busch Brewing Association vs. United States, 207 U. S., 556.

In the Wiegmann case the question was whether certain articles were "manufactures of shells," made dutiable by a certion provision of the tariff laws, or "not manufactured" shells, made exempt from duty by another provision thereof. These articles were shells which had been gathered in London from the seashore in all parts of the world and there subjected to a certain treatment which altered them to a certain extent. In their natural condition the shells consisted of two or three layers. By the treatment all layers were removed except the inner one which presented a pearly appearance and in case of some of them, in addition, the Lord's prayer or some motto was etched on them. In either condition they were used as ornaments and in the former condition they were sold for the purpose of making buttons and handles to penknives out of them. It was held that in neither case were the articles "manufactures of shells." They were all "unmanufactured shells." Judge Blatchford, who decided the hay case before his elevation to the Supreme Bench, delivered the opinion of the court. He said;

"We are of the opinion that the shells in question here were not manufactured, and were not manufactures of shells

within the sense of the statute imposing a duty of 35 per centum upon such manufactures, but were shells not manufactured, and fell under that description in the free list. They were still shells. They had not been manufactured into a new and different article, having a distinctive name, character or use from that of a shell. The application of labor to an article, either by hand or by mechanism does not make the article necessarily a manufactured article, within the meaning of that term as used in the tariff laws. Washing and scouring wool does not make the resulting wool a manufacture of wool. Cleaning and ginning cotton does not make the resulting cotton a manufacture of cotton. In Schedule 'M' of Section 2504 of the Revised Statutes, page 475, 2nd. Edition, a duty of 30 per cent ad valorem is imposed on 'coral cut or manufactured,' and in Section 2505, page 484 'coral, marine, unmanufactured' is made exempt from duty. These provisions clearly imply that, but for the special provision imposing a duty on cut coral, it would not be regarded as a manufactured article, althougn labor was employed in cutting it."

He cited four decisions in support of the conclusion reached. The first of these was his hay case. The third was the decision of the Supreme Court in the early case of United States vs. Potts, 5 Cr., 284, in which it was held that round copper plates turned up and raised at the edges from four to five inches by the application of labor to fit them for subsequent use in the manufacture of copper vessels, but which were still bought by the pound as copper for use in making copper vessels, were not manufactured copper. In the fourth case, towit; United States vs. Wilson, 1 Hunt Mer. Mag., 167, Judge Betts of the lower Federal Bench had held that marble which had been cut into blocks for the convenience of transportation was not manufactured marble, but was free from duty, as being unmanufactured.

The second case was the decision of the Supreme Court in the case of Lawrence vs. Allen, 7 How., 485, which he states was to the effect that India Rubber shoes made in Brazil by simply allowing the sap of the India Rubber tree to harden upon a mould, were a manufactured article and that "because it was capable of use in that shape as a shoe and had been put into a new form, capable of use and designed to be used in such form."

The Anheuser Busch Brewing Association case was what may be termed a draw-back case. It arose under an act of Congress which provided that where imported materials on which duties had been paid were used in the manufacture of articles manufactured or produced in the United States there should be allowed on the exportation of such articles a draw-

back, equal in amount to the duties paid on the materials used, less one per centum of such duties. The Association was engaged in the manufacture of beer at St. Louis and exporting it in large quantities from the United States in bottles duly corked by it with corks so as to preserve the beer. The corks which it so used had been imported by it from Spain where they had been cut by hand to a size of over ¾ of an inch in diameter, measured at the larger end. After being received in St. Louis a careful selection was made from them of those fit for use and those selected were assorted according to sizes and branded by unskilled labor. They were then put into a machine or air fan and all dust, meal, bugs and worms were removed therefrom. They were then thoroughly cleaned by washing and steaming, removing the tannin and germs and making the cork safe and elastic, and made absolutely dry by exposure to blasts of air in a machine. Following this, they were put for a few seconds into a bath of glycerin and alcohol which closed up all the seams, holes and crevices and gave the corks a coating. The corks were then dried by the absorption of the chemicals that covered them. This whole process took from one to three days, the longest part of it being the drying after the chemical bath. They were then taken to the bottling department where they were again soaked or wetted by steaming them for a short time so they would fit snugly and easily in the bottles. All of this was done by skilled labor. The object of the treatment was two-fold—to prevent the beer from acquiring the taste of the cork and to prevent the escape of the gasses in the beer, the escape of which would render it flat. Either result happening would injure the market for the beer and not otherwise could beer with safety be exported from the United States to foreign countries. The Brewing Association claimed that on the exportation of these corks in the bottles of beer it was entitled to the statuory draw-back. The Supreme Court denied its right thereto. Mr. Justice McKenna said;

"In opposition to the judgment of the Court of Claims, counsel have submitted many definitions of 'manufacture,' both as a noun and as a verb, which, however, applicable to the cases in which they were used, would be, we think, extended too far if made to cover the treatment detailed in finding 3 or to the corks after treatment. The words of the statute are indeed so familiar in use and of meaning that they are confused by attempts at definition. Their first sense as used is fabrication or composition,—a new article is produced of which the imported material constitutes an ingredient or part. When we go farther than this in explanation we are involved in refinements and impracticable niceties. Manufacture implies a

change, but every change is not manufacture, and yet every change in an article is the result of labor and manipulation. But something more is necessary as set forth and illustrated in Hartranft vs. Wiegmann, 121 U. S., 609. There must be transformation; a new and different article must emerge, 'having a distinctive name, character or use.' This cannot be said of the corks in question. A cork put through the claimant's process is still a cork."

This completes the presentation of the decisions relied on by the respondents to support their contention. I have given not only the point decided in each of them, but the reasoning and authorities upon which each was based. It will be noted that certain of the decisions coming from noncontrolling jurisdictions have been cited and relied on in those coming from controlling jurisdictions. The ice cream and coffee cases from Louisiana were cited by the Kentucky Court of Appeals in the laundry case; the natural ice cases from Massachusetts and New York, the coffee and slaughter house cases from New York and Judge Blatchford's hay case were cited by the Sixth Circuit Court of Appeals in the compress case, and the hay case was cited by the Supreme Court in the shell case. This endorsement of these decisions coming from noncontrolling jurisdictions may be thought to give them more weight than they would otherwise have. It will be noted further that in no one of these decisions was it held that an establishment of the character of that involved here was not a manufacturing establishment or that the owner or operator thereof was not a manufacturer. The argument is that the cases involved in these decisions are analogous to this and that it follows, therefore, from the fact that the persons as to whom the question was there whether they were manufacturers were not, that the bankrupt was. The reasoning on behalf of respondents is thus largely analogical. And it will be noted further that in each one of these decisions the reasoning by which it is upheld, if not entirely so, is almost entirely of the same character. Respondents gather from these decisions that the mere application of labor to an article by means of machinery, however complicated, does not constitute the one applying it thereto a manufacturer and, from the coffee cases, one of them, the Louisiana case, approved by the Court of Appeals of Kentucky in the laundry case, and the other, the New York case, approved by the Sixth Circuit Court of Appeals in the compress case, that mere change in the color resulting therefrom, does not constitute him such. But what they most emphasize is the epigrammatic formula found in the hay, the shell and the cork cases, varied in each to suit its particular character. In the hay case Judge Blatchford said, they say, that hay is not

a manufactured article because it "is still grass" and in the shell case that the articles there involved were not manufactures of shells because "they were still shells" and in the cork case Judge McKenna said that a cork put through the brewing company's process was not a manufactured article because it "is still a cork." As the cherries here, after being treated by the bankrupt were still cherries, they maintain, that because of this formula, the bankrupt was not a manufacturer and its establishment was not a manufacturing establishment. They urge that the bankrupt's business was that of fruit preserving. It characterized itself as a fruit preserver on its letter heads and, in its articles of incorporation, it is stated that it was formed for the purpose of "buying, selling, dealing, preserving and packing fruits, vegetables, fruit products and similar articles." They cite no case involving the question as to whether a fruit preserver is a manufacturer, but refer to two dicta, which they claim is to that effect. One is the dried apple illustration of Judge Blatchford in the hay case. He said that "dried apples would not be called a manufactured article, though the apple is peeled, and cored and sliced and dried by exposure to the sun and manipulation." The other is a statement of Mr. Justice Brown in the case of Schlitz Brewing Co. vs. United States, 181 U. S., 584, 589, to the effect, as they put it, that canning fruits and vegetables by a process that requires them "to be encased" does not constitute manufacture.

Such then I understand to be the line of respondents argument. I think I have made a full and fair presentation of it. It must be conceded that it is quite formidable and that he who undertakes to meet it has somewhat of a task before him. It is in order now to test its soundness.

Before coming to close quarters with it some preliminary observations and queries are not out of place. The first observation I would make is that the subject now in hand is a large one. That subject may be stated to be who is a manufacturer within the meaning of legislation favoring manufacturers in the way of exempting them from taxation or payment of duties, or providing for facilities to do business, or favoring their employees or persons furnishing materials or supplies, in the way of giving them a lien or priority. I take it that within the meaning of legislation of the latter character he is a manufacturer who is such within the meaning of legislation of the former. Hence I class the two kinds of legislation together. I take it also that the words "manufactured article" when used in such legislation mean an article manufactured by one who is a manufacturer within the meaning thereof and that the word "manufactory" or the words "manufacturing es-

tablishment" or "manufacturing plant" so used mean a place where articles are manufactured by one who is a manufacturer within such meaning. Hence I limit the subject to a consideration of who is a manufacturer within the meaning of such legislation. I am not concerned with the meaning, in other connections, of the verb "to manufacture" or the noun "manufacture" or the participial adjective "manufacturing." There is a note in the case of Williams vs. Warren, 72 N. H., 305, as reported in 64 L. R. A., 1, dealing with the question as to what are manufacturing corporations within the meaning of taxation laws, which covers thirty seven pages, many of them full pages, of small print, in double columns, in which several hundred cases are referred to. The subject is not only a large one, but there is considerable conflict in the decisions having to do with particular phases of it, and there is not a little confusion of thought in regard to it. The author of the note referred to says "the decisions contain many anomalies." He instances some of them by asking these questions;

"Why is cutting up trees into blocks of kindling wood for use in furnaces manufacturing, while cutting up ice into blocks for use in refrigerators is not? Why is making biscuits manufacturing, while making bread or ice cream is not? Why is printing and publishing books and magazines manufacturing, while printing and publishing newspapers is not? Why is putting the parts of a fountain pen together manufacturing, while putting the parts of a cask together is not? Why should the dried sap of the caoutchouc tree, if collected around a shoe last be a manufactured article, while grass dried into hay is not?"

He adds;

"Many similar questions are in one's mind and find no answer when the cases are read together."

In view of this situation the whole subject calls for fresh treatment from the ground up so as to bring order out of chaos. Such treatment would call for a consideration of each case where the question had been involved and much reflection. Want of time prevents my giving such a treatment to the subject. And I do not feel that the necessities of this case require that I should do so. But the failure to do so, whilst I do not think it will affect the correctness of the conclusion reached, may be responsible for possible crudities which I may be guilty of in the course of the discussion. The ideas which I have are the result of reflection upon the decisions already considered and a few others.

The next observation which I would make is that whether one is a manufacturer is to be determined by what is his principal business and not by what are mere incidentals to it. In

the New York slaughter house case Judge Martin noted that the fertilizer which was made at such an establishment might be regarded as a manufactured article, but held that this fact did not affect the character of the operator's occupation because the making of fertilizer was not the "principal business" in which he was engaged but was a "mere incident" to it. In the case of In re Chandler, Fed. Cas., 2591, Judge Lowell gave two reasons for saying that a farmer who made cider or cheese was not a manufacturer. One was that "the making is one merely incidental to the cultivation of his land, like curing hay, etc."

No doubt many other cases can be found where a similar position has been taken.

The final observation which I would make is that in determining who is a manufacturer within such meaning we should not limit ourselves to the grammatical meaning. This is so because the word, in the course of time, has taken on more than its grammatical, or, more specifically, its etymological meaning. Etymologically it means one who makes something by hand. It is now not so limited to one who makes by hand. It, at least, includes one who makes by machinery. Common usage has given at least this additional significance to it. In the case of Lawrence vs. Allen, supra, Mr. Justice Woodbury said;

"Going to more technical definitions and to first principles, such a process to make the shoe is making an article by hand, which was once the literal meaning of the word 'manufacture,' or manu factum, and in the modern idea attached to the word, it is making an article, either by hand or machinery, into another form capable of being used and designed to be used in ordinary life."

And in the case of Tide Water Oil Co. vs. United States, 171 U. S., 210, Mr. Justice Brown said;

"The primary meaning of the word 'manufacture' is something made by hand as distinguished from a natural growth; but as machinery has largely supplanted this primitive method, the word is now used ordinarily to denote an article upon the material of which labor has been expended to make the finished product."

The queries which I would put are these. In the first place, is one who simply makes by hand ever a manufacturer within the meaning of such legislation? Is it not essential that he be a maker by machinery to a more or less extent in order that he come within its meaning? Again, to this end, is it or not essential that he be a maker on a considerable scale? If so this of itself would seem to exclude a maker by hand, as the one who makes by hand cannot make on a considerable

scale. I find an indication that this is essential in two old cases coming from the lower federal bench. In the case of Schiefer vs. Wood, Fed. Cas. No. 12841, Judge Hall, in explaining why it is "that we do not ordinarily call a woodsawer a manufacturer and that we do not usually term a miller, who simply grinds corn in his mill, a manufacturer" gives as one reason therefor, that "their operations are usually quite limited." He said further;

"We do not ordinarily apply the term 'manufacturer' to one whose operations are as limited as those of a woodsawer; but when great quantities of saleable articles are produced, even by a single operation of a very simple machine, we frequently, if not ordinarily, speak of the operation as a manufacture. When large quantities of kindling wood are made by splitting blocks of wood by machinery, adapted to that special purpose, we do not hesitate to speak of 'it as a manufacture of kindling wood'; and an establishment where very large large quantities of bone dust are produced by grinding by machinery, would, by many in ordinary conversation, be termed as manufactory of bone dust."

And in the Chandler case, supra, Judge Lowell said:

"One who works up lumber on a considerable scale is popularly called a manufacturer of that article and such lumber is spoken of as manufactured in our acts and treasury regulations and in the lately repealed reciprocity treaty regulating commerce with Canada."

The lumber in that case came from the land of the operator of the sawmill and it was in answer to the suggestion in argument that it was like the case of a farmer making cider or cheese that he gave two reasons, one of which has already been quoted. The other is in these words:

"These products when made by the farmer exclusively from his own farm are not usually made on so large a scale as to be called a manufacture, as the word is now commonly used."

Still again, is it sufficient for the person in question to be a maker of things with the making of which machinery had a part, more or less, to do and that on a considerable scale? Is it not essential that he be a seller of the things which he makes? Is not the word used in contrast to the word merchant, trader or dealer? The latter sells what he buys. Does not the manufacturer sell what he makes at least from what he buys? Ordinarily, at least, he must be a seller. For in the very nature of things he cannot keep making things. It is essential for him to sell the things which he makes to keep going.

Norris vs. Com., 27 Pa. St., 495, the word "dealer" was thus defined:

"A dealer in the popular acceptation or sense of the word, is not one who buys to keep, or makes to sell, but one who buys to sell again. He stands immediately between the producer and the consumer and depends for his profits, not upon the labor he bestows on his commodities, but on the skill and foresight with which he watches the markets."

This definition is quoted in note to 21 Ann. Cas., 78, and it is then said:

"The term 'dealers' when used in a statute to describe persons who shall pay a tax does not include manufacturers who sell only their own manufactures. Every manufacturer must sell his wares; but he is not for that reason to be classed as a dealer in such goods."

Reference is then made to the case of Harms vs. Parsons, 32 Beav., 328, in which Sir John Romilly, Master of the Rolls, held that one engaged in the business of a horsehair manufacturer, who sold his business to another and agreed with him not thereafter to carry on the "business of a horsehair manufacturer" breached his agreement by buying and selling manufactured horsehair.

And in the case of People ex rel. Tiffany & Co. vs. Campbell, 144 N. Y., 66, Judge Andrews said:

"Without the power of sale the business of production could not be carried on. The power to sell is an indispensable adjunct to a manufacturing business."

It is in this connection particularly that I would limit the subject in hand to who is a manufacturer within the meaning of such legislation. For the noun "manufacture" may be used in a connection where it means no more than making. As for instance in the case of Kidd vs. Pearson, 128 U. S., 1, the Iowa statute involved therein provided that "no person shall manufacture or sell" and Mr. Justice Lamar said:

"The conjunction is disjunctive. The sale is forbidden; the manufacture is forbidden; and each is forbidden independently of the other."

And again he said: "No distinction is more popular to the common mind or more clearly expressed in economic and political literature than that between manufacture and commerce. Manufacture is transformation—the fashioning of raw material into a change of form for use. The function of commerce is different. The buying and selling and the transportation incidental thereto constitute commerce."

And in the case of United States vs. E. C. Knight Co., 156 U. S., 1, Mr. Chief Justice Fuller said:

"Commerce succeeds to manufacture and is not a part of it."

Here undoubtedly the word "manufacture" is confined solely to making. It is in view of these expressions that I have expressly limited the subject under consideration as above. And the query that I am now putting is whether, invariably, in such connection, a manufacturer is one who is a seller of what he makes?

This suggests the additional query whether he is not also a buyer of that out of which he makes what he sells. Here one runs counter to decisions where this is not recognized as an element of the term. As for instance, in the Chandler case, already twice referred to, a lawyer who had quit the practice of the law and gone to operating a steam sawmill, soon thereafter landed in bankruptcy. The lumber from which he made boards and shingles came from his own land. The question was whether he was a manufacturer. It was held that he was. Judge Lowell began his opinion with this question:

"I am disposed to agree with the argument of the defendant's counsel that one cannot be a trader unless he buys as well as sells, but is not Mr. Chandler a manufacturer?"

The presupposition of the question seems to be that for one to be a manufacturer he must sell, and the answer was that he need not buy as well as sell. He said:

"The fact that the manufacturer uses only lumber which he grows himself does not appear to be material."

In my investigation I have run across other cases where this same position is taken, but I cannot now lay my hand on them.

This leads up to two other queries. Though it is not necessary in order for one to be a manufacturer that he should buy that out of which he makes, is it or not essential that what he makes be made out of what Mr. Justice Lamar, in the quotation made above from his opinion, in the case of Kidd vs. Pearson, calls "raw materials," which passes into what is made? In the quotation from the opinion of Judge Bartlett in the New York coffee case, made above, occurs this reference to Webster's definition of the word "manufacture":

"Mr. Webster defines 'manufacture' to be anything made from raw materials by the hand, by machinery or by art, as clothes, iron utensils, shoes, machinery, saddlery, etc."

And in the case of Schifer vs. Wood, supra, Judge Hall makes this reference to the definitions of the word "manufacture" as given in the dictionaries:

"Among the definitions given by Webster are: (1) 'The operation of reducing raw materials of any kind into a form suitable for use, by hand, by art or by machinery'; (2) 'Anything made from raw materials by the hand, by art or by machinery'; (3) 'To make or fabricate from raw materials by

the hand, by art or by machinery, and work into forms convenient for use'; (4) 'To work raw materials into suitable forms for use.' Worcester has the same definitions in substance; and similar definitions are found in other dictionaries."

In each of these definitions the words "raw materials" figure. It is this question which is involved in the conflict of the courts as to whether an electric plant is a manufacturing establishment or not. The Court of Appeals of New York holds that it is but the Supreme Courts of Maryland and New Hampshire hold that it is not. In the case of Williams vs. Warren, supra, Judge Chase said:

"'Manufacturing' then, in the present statute is used in the sense of working materials into a fabric or structure, as for example, cotton into cloth, iron into tools, wood into carriages, etc. This is the ordinary meaning of the word, and independently of light thrown upon it by the history of the statute, would be regarded as the meaning which the legislature attached to it. The question then resolves itself into this: whether the collection and distribution of electricity for the purposes of power and light are manufacturing within the sense of the word? Machinery and manual labor are required in the process, but this fact alone does not bring it within the meaning of the word. The product of the machinery and labor must be a fabric or structure made from materials of some kind."

The final query is, if it is essential that what is made be made out of materials or raw materials must such materials or raw materials be dead? This question is involved in the question as to whether the operator of a slaughter house is a manufacturer. The necessities of this case do not require that I make answer to either of these queries. The bankrupt used machinery in its establishment to produce the articles produced; it produced on a considerable scale; it was a seller of what it produced; and it produced from dead materials bought by it. It follows from this that neither one of these queries is directly involved herein, and it is for this reason that the necessities of the case do not require that I take position as to either. The only question involved herein, therefore, is whether the bankrupt was a maker. In order for it to have been a manufacturer it is essential that it was a maker. Whatever meaning in addition to its etymological meaning common usage has given to the word manufacturer or is attached to it when used in legislation of the kind heretofore referred to, the idea of being a maker has not been eliminated therefrom. The discussion then has brought us up to and centered in this question whether the bankrupt was a maker. If it was it was a manufacturer. If it was not it was not a manufacturer. And the question whether it was is a philosophical or logical one.

In disposing of it the bearing thereon of the decisions relied on by respondents should first be determined and then the matter should be treated independently of them. By the bearing of those decisions on this question I mean the bearing of the point decided in each one of them, i. e., that the person there in question was not a manufacturer. The bearing thereon of those decisions depends on whether the cases in which they were rendered are truly analogous to that in hand. In so far as they had features not found here which called for the decision rendered they are not analogous.

Such of those cases as involved directly any of the queries which I have put are not true analogies if the query there involved should be answered in the affirmative, for none of those queries are involved here. Such an answer of itself necessitated the decision that the person in question was not a manufacturer. Hence there was no call to pass on the question whether he was a maker, the only question involved here. The New York slaughter house case, for instance, involved the query whether for one to be a manufacturer he must make from dead materials. If he does then on this ground alone the New England Dressed Meat & Wool Company was not a manufacturing corporation and it was properly so held. In this contingency the case did not necessarily involve the question whether that Company was a maker. Again, the Kentucky laundry and the Sixth Circuit Court of Appeals compress cases each involved the query whether for one to be a manufacturer he must be a seller of what he makes. In neither case was the person in question a seller. In each he performed a service for another—in one he laundered clothes in the other, he compressed cotton. If then for one to be a manufacturer he must be a seller of what he makes in neither case was the person in question a manufacturer and it was properly so held. In this contingency neither case necessarily involved the question whether the person in question was a maker. With these cases must be classed certain of the analogies relied on in certain of the other cases. The ginning cotton and the threshing wheat analogies mentioned by Judge Blatchford in the hay case, and the scouring wool analogy, mentioned by him in the shell case, are similar in this particular to the laundry and compress cases. In each of these analogies a service is performed by one for another. There is no selling. To the same class may be said to belong analogies where in connection with the performance of service title to property passes from the one to the other. Such is the case of a contractor who undertakes to erect a building for another, furnishing all the materials. No doubt the shipbuilding analogy, referred to in the Louisana Coffee case, belongs here. Such a contractor is not regarded as a seller. If then that he

be a seller is an essential characteristic of a manufacturer not one of these instances is a true analogy to the case in hand where the bankrupt was a seller. Those three cases, to-wit: the slaughter house, the laundry and the compress cases, therefore, conditionally, at least, do not have any bearing here, the condition being that the queries which they involved call for an affirmative answer.

The Louisiana ice cream case also has no bearing conditionally, the condition here being that the person there in question was a confectioner and his production of ice cream was a mere incident to his business of a confectioner, as no one is a manufacturer unless that as to which alone he can be said to be a manufacturer is his principal business and not an incident thereto and such was not the case here. I am not in position to say as to what is the truth as to this as I do not have the full case before me—all I know of it is what I gather from counsel's briefs. But the analogy relied on in the quotation given from the opinion therein, which seems to have influenced the decision, to-wit: that of the mammonth kitchen of the Grand Union Hotel at Saratoga, indicates that such was the fact. However the same illustration was used by the same court in the later coffee case and the production of coffee there seems to have been not only the principal, but the only business of the producer. It is to be noted in connection with this analogy that in the ice cream case its application was made to hang on the circumstance that no one visiting the kitchen would "magnify the cooks and pastrymen into manufacturers," but the court in the coffee case, in referring to the use which it had made of the analogy in the earlier case, remarked that it had there said "that the mammoth kitchen of a hotel is not a manufactory." That resort would have been made to such an analogy and such use made of it indicates the confusion of thought under which the court was laboring. Of course the mammoth kitchen of the Grand Union Hotel at Saratoga or of any other great hotel is not a manufactory, but not because they do not make things in it, but because the kitchen is a mere incident to the business of running a hotel and the word "manufactory" is never applied to what is a mere incident. For this reason and the additional one that the term is never applied to the employees in what is properly called a manufactory the cooks and pastrymen in such kitchen are never termed manufacturers. This consideration is sufficient to render Judge Blatchford's hay case without bearing absolutely. A sufficient reason for holding that hay is not a manufactured article is that it is produced by a farmer and the production of hay is simply an incident to the business of farming. It was on this ground that Judge

Lowell, in the Chandler case, put it that a farmer was not a manufacturer from the fact that he cured hay.

The decisions in certain of the other cases are without bearing absolutely, but for a different reason. This is so of the decisions in the two natural ice cases. The ground of their being without bearing is that in connection with the handling of natural ice there is no making and of course, where there is no making, there is no maker. The existence of natural ice is due to nature, over whose forces in producing it the handler thereof exercises no control. All that he does is to change the place and manner of its existence after it is produced. He removes it from the pond, river or lake to the ice house and thence to the consumer and in so doing he divides it up into separate parcels. Altering the conditions of existence of a substance does not constitute making. As well put by Judge Colburn in the Massachusetts case such treatment of natural ice is no more a making than the putting of water from a pond into casks for transportation and he properly classed it with mining coal, the only difference being that coal is a permanent formation until dug, and ice is a temporary one. It has always been held that mining in all its forms is not a manufacturing and no doubt for this reason Judge Bett's decision in the marble case cited by Mr. Justice Blatchford in the shell case belongs here, for quarrying stone is a species of mining. On this ground the compress case, and the ginning cotton, the threshing wheat and scouring wool analogies referred to by Judge Blatchford in the hay and shell cases, which, for another reason, I have said are without bearing, conditionally, are so absolutely. In such cases there is no making save in what nature has done before the doing of that which alone can constitute the person in question a manufacturer. In what he does he does not make. He simply changes the conditions of existence. The compressor presses the cotton together; the ginner separates the hulls and seeds from the cotton; the thresher separates the wheat from the straw; and the wool scourer cleanses the wool. And on this ground, the laundry case which, for another reason, I have said is without bearing, conditionally, is so absolutely. In laundering there is no making in what the launderer does and hence he is not a maker. The handler of natural ice, the miner, the compresser, the ginner, the thresher, the wool scourer and the launderer, therefore, are essentially alike in this that in what each does there is no change in the thing with which he has to do—such change as there is being limited to its condition of existence—and hence no making and neither is a maker. Neither, therefore, is a true analogy to the bankrupt because in the matter of coloring, sweetening cooking and flavoring a change was made in the thing with which it

had to do. I am not now considering whether such change is sufficient to constitute the bankrupt a maker. That will be considered later. I am merely noting that this difference between those instances and this renders them without bearing on the question whether the bankrupt was a maker and that absolutely. I have already noted that the decision in the hay case is without such bearing because curing hay is a mere incident to the farmer's business. There is an additional reason for this position in the fact that in what the farmer does in curing hay is no making. Judge Blatchford seems to have been of the view that in the change from grass to hay there was no making at all. I will deal with this later. But assuming that he is wrong in this view and that there is a making in such change it is nature and not the farmer that makes the change and hence the farmer cannot be said to be a maker, notwithstanding the adage of making hay while the sun shines. He simply manipulates the grass so that nature can do her work better. He does not manipulate the forces which are the efficient cause of grass becoming hay. Judge Colburn in the Massachusetts natural ice case had the true idea of the matter when he classed hay harvesting and ice harvesting together. There is, however, a difference between the two. In each case, so far as there is a making, it is nature that does the making. The farmer in the one case and the ice man in the other do not make, but the former takes a hand during the process of making, whereas the latter does not do so until that process is completed. In this case the changes in the matter of coloring, sweetening, cooking and flavoring, which it remains to be determined whether it was a making and constituted the bankrupt a maker, was due to its agency alone.

So far then I have reached the conclusion that the natural ice, hay, compress and laundry decisions are without bearing absolutely and the slaughter house and ice cream decisions are so conditionally. There are reasons for thinking the decisions of the United States Supreme Court in the shell and cork cases are without bearing absolutely, but as I desire to dispose of all the other decisions relied on before taking them up I pass them by for the present. As to the slaughter house and ice cream decisions I will assume that they have bearing, because I am not prepared to answer the query involved in the one case in the affirmative and I am not sure that in the other the production of ice cream was not the principal business of the person as to whom the question was there whether he was a manufacturer. Apart then from the decisions in the shell and cork cases the following will be accepted as having bearing, to-wit: the ice cream, the two coffee, the slaughter house and the tailoring decisions. The last one, to-wit: the

tailoring decision, is the only one coming from a controlling jurisdiction, to-wit: the Kentucky Court of Appeals.

Now a word or two as to the standing of these decisions in view of the reasoning on which they are severally based. That of the Louisiana ice cream decision is seriously affected by the consideration that it was distinctly based on the mammoth kitchen analogy, which was without bearing absolutely, except on the ground that the making of ice cream was an incident which does not clearly appear and that no point was made of this feature. The Louisiana Coffe decision was based not only on this same analogy, but the analogies of mining and shipbuilding between none of which and the case in hand was there the slightest resemblance. Its standing is further affected by the attempt to distinguish the case from the rice miller case, between which cases I find it very difficult to see any distinction. It is in this jurisdiction that one of the anomalies referred to by the author of the note to Williams vs. Warren, supra, is to be found. In the case of State vs. Eckendorf, 46 La. Ann., 131, that court held that a baker of bread was not a manufacturer; and in the case of State vs. Am. Biscuit Mfg. Co., 47 La. Ann., 160, it held that a corporation making biscuits, crackers, Italian, fancy and soup pastes out of flour was a manufacturer. I do not have the cases before me. Possibly the baker of bread did not do so on a sufficiently large scale to be called a manufacturer. The decisions in the ice cream and coffee cases can hardly stand against the latter decision of that court in the case of State vs. Am. Sugar Refining Co., 108 La. Ann., 603, where it held that refining raw sugar and crude molasses was manufacturing, overruling an earlier decision that it was not in the case of State vs. American Sugar Refining Company, 51 La. Ann., 562. The decisions of that court show that it has been much befuddled as to what is necessary to make one a manufacturer.

The New York coffee case differed from the Louisiana coffee case in that in the latter all that was done was to roast green coffees, the effect of which was not to change the form, but the color and internal structure, whereas in the latter in addition to this the coffee so roasted was ground and different kinds of coffee were mixed together forming a combination article. There is little or no reasoning in Judge Bartlett's opinion. The only thing in it which can be called reasoning is the statement that for one to be a manufacturer he must produce a new article, which is undoubtedly sound. But it is difficult to make out that the result of the process involved therein was not a new article. Certainly the ground Coffee was not the same article as the green coffee bean that was subjected to the process. If it was not the same article it must have been a new one. Other than this he contented him-

self with saying in one place "We think it very clear" and in another "It is quite apparent" that the defendant was not a manufacturing corporation, and citing the decision in the shell case from the Supreme Court of the United States and its previous decision in the natural ice case, heretofore considered, in support of the conclusion reached. When we come to consider the former decision it will appear how pertinent it was to the case then in hand and from what we have said as to the latter it is certain that it was not "in a mile thereof," to use the language of a learned judge.

As to the New York slaughter house decision these things are to be noted. The Appellate Division from which the case was taken to the Circuit Court of Appeals of New York held that the operator of the slaughter house was a manufacturing corporation. As in the coffee decision the conclusion of the court was not the result of any substantial reasoning. It was nearly a mere fiat. The court began by saying that it thought and ended by saying that it was clearly of the opinion that the operator thereof was not a manufacturing corporation. Confusion of thought is shown in this sentence: "The business conducted by the relator was obviously that of purchasing, slaughtering and selling sheep and lambs." It would have been more correct to say that its business was that of purchasing and slaughtering sheep and lambs and selling mutton and lamb.

The Supreme Court of Ohio in the case of Engle vs. Sohn, 41 Ohio State, 691, reversing its earlier decision in the case of Jackson vs. State, 15 Ohio, 652, held that the business of purchasing and slaughtering hogs and packing pork, producing lard and curing hams and bacon was manufacturing. I see no room on principle for holding that such business is not manufacturing save the one I have suggested that the word manufacturer relates only to one who makes from dead material.

This brings me to the very recent decision of the Kentucky Court of Appeals in the tailoring case. It is somewhat difficult to determine the exact basis of the decision. There are some things about it which are reasonably certain. Judge Carroll was of the opinion that in determining who is a manufacturer or what is a manufacturing establishment within the meaning of favoring legislation of the character heretofore described, the dictionary meaning is not controlling—that they have a more limited signification in such legislation. It was such a thought as this that led me to put the several queries hereinbefore set forth. In no dictionary definitions is the idea of making on a considerable scale or selling what he makes embraced. The fact that it is favoring legislation tends to the position that it was not intended to embrace every maker.

Again it is certain that the ground of the decision was not that the tailoring company was not a maker, the only possible ground upon which it can have bearing here. It was admitted that what it did came within the dictionary meaning, the fundamental idea in which is that of a maker.

The real basis of the decision seems to have been a fear of the consequence of holding that the Tailoring Company was a manufacturer and its establishment a manufacturing establishment. It was thought that if its claim to exemption were sustained it would be "an unjustifiable discrimination to deny a like exemption to every merchant tailor in the City of Louisville" and that "if the merchant tailor in the city were granted the exemption, no good reason could be assigned for not exempting all the milliners, all the dress makers, all the bakers, all the confectioners, all the shoemakers, all the carpenters and all the cabinet makers who have places of business in the city and all other persons who are engaged in converting articles from one form to another." It is not unlikely that if there had been "scorn of consequence" the decision would have been different.

But this consequence would not necessarily follow from a holding that the Tailoring Company came within the ordinance. There was a difference between it and all these others which was not noticed. That difference was that it may be said that it made on a considerable scale and they did not. It is stated that the company had 60 employees and a number of machines operated by electricity whereas a merchant tailor would have no more than twelve making by hand and machine. And possibly another difference between it and some of the cases referred to was that the makers were not sellers also.

The final remark which I would make on the case is that Judge Carroll cautioned against the use of the decision as an authority in other cases not exactly like it. He said:

"The meaning that should be given to these words may come up in other cases presenting entirely different states of fact, in which the meaning here ascribed to them would be both inappropriate and unjust, and therefore what we say upon the subject must be understood as referring directly to the question submitted in this record for our decision."

So much then as to the standing or weight of these decisions. I frankly concede that if the producer of ice cream or of unground roasted coffee, or of ground roasted coffee, or of mutton and lamb, or of clothes is not a maker then the bankrupt was not and it was not a manufacturer or its

establishment a manufacturing establishment. But the reasoning on which they are severally based is faulty.

This brings me to a consideration of the two decisions of the Supreme Court of the United States which, of all the decisions relied on by respondents, are probably most in the way of holding against their contention.

The opinion in the shell case was delivered by Mr. Justice Blatchford, who just before his elevation to the Supreme Bench, had decided the hay case. The epigrammatic formula made use of by him in the shell case and repeated by Mr. Justice McKenna in the cork case had its origin in the hay case. In view of this before taking up the shell and cork cases this feature of that case, which was passed in our former consideration thereof, should be dealt with. As heretofore noted it was held therein that baled hay is not a manufactured article. Undoubtedly this decision was sound. Apart from the fact of baling, it was not such on the two grounds heretofore set forth, one being that the curing of hay is a mere incident to a farmer's business and the other that, though the change from grass to hay is a making, it is nature and not the farmer which brings this about. He merely disposes the grass so that nature may do her work better. Its baling does not constitute it a manufactured article because in baling there is no making, the change which is thereby brought about being simply a change in the condition of the hay's existence, just like in the compress case, we found, that pressing cotton into bales is not a making. But Mr. Justice Blatchford did not place the decision on either ground. He placed it on the ground that at no stage in the production of baled hay is there a making. He said:

"Cotton and grains are the same articles they were when on the plant with its roots in the ground. So hay is the same article as it was when it was stalks of grass with roots in the earth. It is dried to be sure; but the drying and any conversion of starch into sugar are mere incidents of the cutting to enable it to be stored for food in latitude where grass can not be found the year round."

What is here said as to hay I submit is not sound. Hay is not still grass. Hay is hay and grass is grass. Hay is different from grass in color, structure and name. That Judge Blatchforl realized that he was perhaps putting the matter too strongly appears from his putting it less strongly when after referring to the dried apple analogy, he said:

"The substance of dried grass or hay is still grass."

What then is the bearing of the decisions in the shell and cork cases on the question whether the bankrupt was a maker and what is to be said as to the validity of the rea-

soning on which they are severally based in so far as they have record? To determine these matters as to the shell case it is important to note what was the exact point decided therein. It was that the "Lord Prayers," "Turk's Caps," "Magpies" and other articles therein involved were not "manufactures of shells," but were "not manufactured shells." It was not decided therein that they were not manufactured articles, unless the question whether they were was involved in determining whether they were "manufactures of shells" or "not manufactured shells." If I knew just what a manufacture of shells within the meaning of the tariff act there involved was, I would be in a better position to determine whether the decision involved this subordinate question, but I do not know. The opinion contains not the slightest hint of what it is. It simply holds that the articles there involved were not "manufactures of shells," but were "not manufactured shells." If the preposition "of" in the first phrase was used in its primative sense, i. e., in the sense of away from or as denoting absence or non existence, in which case the meaning of the phrase would be manufactures from shells and would cover articles in which the shells have lost their identity, then the decision that those articles were not manufactured shells did not involve the question whether they were manufactured articles, i. e., articles which had been made—which owed their existence to a maker. Or, if that preposition was used in its casual sense, according to which the meaning of the phrase was artificial shells, i. e., shells that had been made by the act of man and not by nature, then also the decision that those articles were not manufactures of shells did not involve the question whether they were manufactured articles. And it is only in the event that the decision did involve this subordinate question that it can have any bearing on the question whether the bankrupt was a maker. But in view of Judge Blatchford's statement, in the course of his argument, that the application of labor to an article "does not necessarily make the article a manufactured article within the meaning of that term as used in the tariff laws" and his further statement that the provisions thereof as to coral imposing a duty on "cut or manufactured" coral implied that in the absence of a duty on "cut" coral expressly, such coral "would not be regarded as a manufactured article, although labor was employed in cutting it," it may be thought that he regarded the question before him to be whether those articles were manufactured articles. I will assume that he so regarded it and that such was the question therein. Of course, if that is so, the case does have direct bearing on the question

as to whether the bankrupt was a maker. But on this assumption what is to be said as its correctness and that of the ground on which it is based?. I am not now concerned with the question as to whether I am bound to follow it. That will come later. It was not an aid to coming to the conclusion thus assumed, to have emphasized, as Judge Blatchford did, the thought that the mere application of labor to an article does not cause it to be a manufactured article. That is a truism, mention of which was more likely to confuse than to enlighten. It did not follow, therefrom that the article in question was not a manufactured article. The question in such cases always is whether the result of application of labor to the article in question therein is manufactured articles, i. e., articles of which it can be truly said that they have been made. Such may or may not be the result thereof. And it is upon that question that attention should be concentrated. The substance, if not the whole of Judge Blatchford's argument, apart from the analogies relied on, is to be found in two sentences, the first of which I have characterized as an epigrammatic formula. They are:

"They were still shells. They had not been manufactured into a new and different article, having a distinctive name, character or use from that of a shell."

The statement that the articles there involved were still shells should be pressed hard to see just what it can be made to mean. It may mean that they were still parts of the original shells, i. e., that the labor which had been applied to them had not changed them from so being. In this sense the statement may be taken as true. But it may mean that those articles were the same things which they had been before labor was applied to them, i. e., in Judge Blatchford's language they were not new and different articles. In this sense I respectfully submit that the statement was not true. Those articles were not the same thing which they had been before labor was applied to them. Not being the same it necessarily followed that they were new and different articles. And they were new and different in that they had a distinctive name, character and use from that of shells. They were called "Lord Prayers," "Turk's Caps," "Magpies" and so forth, whereas before they were simply called shells. They were only parts of shells beautified and ornamented whereas before they were as nature had made them. They were used as ornaments and to make pen knives and buttons, whereas before they were put to no use. If then the decision is to be taken as holding that those articles were not manufactured articles so much of the reasoning on which it was based is faulty.

So much of it as relied on certain analogies is equally so. Scouring wool and ginning cotton does not result in manufactured articles, because, as we have shown, in the application of such labor to wool and cotton there is no change in them and hence no making. Wool and cotton thereafter are the same articles which they were before. The sole effect of the application of such labor thereto is to change the conditions of their existence. They are merely separated from the substances in connection with which they have previously existed. I am not sufficiently posted as to what cut coral is to attempt a criticism of this analogy. The baled hay analogy, from what I have already said, was not pertinent, nor was the marble blocks analogy. In the latter there is no change in the marble and hence no making in connection with cutting the marble into blocks. That is a species of mining. In the former, though there is a change from grass to hay and hence a making in connection with curing the hay, the farmer is not the efficient cause of the change or making and, in so far as he renders aid, that is an incident to his business as a farmer. I am not quite sure that I understand the copper plate analogy. It was held in the case involving it that round copper plates turned up and raised at the edges were not manufactured copper. If by manufactured copper was meant articles manufactured out of copper I cannot see its pertinency. The only other anology, to-wit: that of the India rubber shoes, favored the holding that the articles in question therein were manufactured articles. By the efficient activity of the person, as to whom the question was whether he was a manufacturer, the sap of the India rubber tree had been changed into India rubber shoes. So in the shell case by the efficient activity of that person the natural shells had been changed into those articles. The change was not so great; yet it was a distinct change. For these reasons, therefore, I am driven to the conclusion that, on the assumption that what was decided therein was that the articles in question were not manufactured articles, the decision cannot stand criticism. The case has been pretty frequently interpreted as so deciding, i. e., that in the production of those articles there was no making and the producer thereof was not a maker and it has been much cited. It was cited in the two coffee cases herein criticised where it was evidently so interpreted. And I am much persuaded that it is responsible for much confusion of thought in the field now under consideration.

This leaves the cork decision. In connection with this case it will be noted that the question for decision therein was not whether a person whose sole business was to pro-

duce by the process therein described corks which would prevent the escape of gas from the beer enclosed by them in bottles and would not impart their taste to it, from corks imported by him from Spain or not so imported, and then place them on the market would be a manufacturer within the meaning of legislation of the character hereinbefore referred to. No such question was presented. To understand this decision, clearly, note should first be taken of the earlier decision of that court in the case of Joseph Schlitz Brewing Co. vs. United States, 181 U. S., 584. There the Brewing Company had imported hops, barley, bottles and corks. It had been allowed the draw-back on the hops and barley as coming within the statute. They were imported materials which had been used in the manufacture of beer manufactured by the company and subsequently exported. They, therefore, clearly came within the terms of the statute. They were ingredients of the exported beer. Its right to a draw-back on the bottles and corks alone was involved in the case and it was denied because the bottles and corks were not ingredients of the exported beer, but only its encasement. The statute was construed to cover only imported materials which were ingredients of the manufactured article subsequently exported. Mr. Justice Brown said:

"To speak of the bottles and corks as ingredients of the beer is an abuse of language."

In this case it did not appear that the corks had been given any special treatment to fit them for duty. The later case came about by another Brewing Company thinking that because of such treatment it could get within the draw-back statute as to its corks. Its position was, that the imported corks were an ingredient of the exported corks and on the exportation of the bottled beer it would be entitled to the draw-back. Mr. Justice McKenna was of the opinion that there was force in the position that within the meaning of the statute the corks and bottles were not exported—an exportation of the article of which the imported materials were an ingredient being essential to entitle one to the draw-back. Within that meaning the beer alone was exported, the exportation of the corks and bottles being a mere incident to its exportation. But he did not place the decision on that ground. In the earlier case Mr. Justice Brown, as we have seen, construed the words "imported materials * * * used in the manufacture of article manufactured or produced in the United States" in the statutes as covering only such materials as became ingredients of another article manufactured or produced in this country. It was far fetched to say that the

imported cork was an ingredient of the finished cork. And the denial of the right to the draw-back might well have been placed on this ground. I will not say that it was not so placed. But the matter was put in such a way as to lend color to the view that, if the question in the case had been that which I have stated it was not, it would have been decided that such person was not a maker and hence not a manufacturer within the meaning of such legislation. What Mr. Justice McKenna says that lends color to this view is open to some criticism. He says for instance:

"Manufacture implies a change, but every change is not manufacture, and yet every change in an article is the result of treatment, labor and manipulation. But something more is necessary."

Now I take that manufacture here means the same as making. And it will clear the situation somewhat to substitute the one word for the other. So doing we have:

"Making implies a change, but every change is not a making, and yet every change in an article is the result of treatment, labor and manipulation. But something more is necessary."

This statement is ambiguous and in one view of it is, as I submit, erroneous. What sort of a change is had in view? Is it a change in the article itself, which is the subject of treatment, labor and manipulation, or in the conditions of its existence? The first clause of the first sentence does not say which. It takes in either change. The last clause seems to have in view a change in such article itself. A change in the condition of existence of an article is never a making, but a change in the article itself is always a making. There is no reason why one change in an article itself rather than another shall constitute a making.

He bases this statement on the shell case, which undoubtedly was the source of all that he had to say in this connection. I have already indicated what seems to me the faulty reasoning in that case. He then says:

"There must be transformation; a new and different article must emerge, 'having a distinctive name, character or use.' This cannot be said of the corks in question. A cork put through the claimant's process is still a cork."

Undoubtedly there must be transformation and a new and different article must emerge. But what is essential in order that there may be a transformation and that a new and different article may emerge? Is it not sufficient that what emerges is not the same article which was in existence before the treatment, labor and manipulation? If it is not the same is it not a new and different article and has not a transformation taken place? And is it material in

what the lack of sameness or the newness or difference consists? Is not one particular of such lack or of newness or of difference just as effective as any other? Is there any logical ground for making a difference between such particulars? If not why then add that the new or different article shall have a distinctive name, character or use? If the article which emerges is not the same but a new and different one, what boots it whether it is given a distinctive name or not or whether it is put to a distinctive use or not? Though it retains its old name and is put to the same use has there not been a making? It is essential, however, that it have a distinctive character, but is not saying so tautological? If in fact a new and different article has emerged is it not necessarily distinctive in character? It seems to me that to constitute a making it is essential that the article which emerges should not be the same but a new and different article. If it is not the same, it is new and different and it has a distinctive character, and, in that contingency, it is entirely immaterial whether it is given a distinctive name or put to a distinctive use.

Coming to the statement that a cork put through the claimant's process is still a cork, we must do as we did with Mr. Justice Blatchford's statement in the shell case that the articles there involved were still shells, i. e., press it hard and see what possible meanings it is capable of and which if any of them can be true. It may mean that they were still called corks. That no doubt was the case. But is the fact that they were given the same name as before indicative of the fact that there had been no making. The preceding statement in the alternative that the new and different article which emerges must have a distinctive name, character or use concedes that it is not essential that it have a new name. It is sufficient if it have a distinctive character or is put to a distinctive use. In the case of Tide Water Oil Co. vs. United States, 171 U. S., 216, Mr. Justice Brown said that "ordinarily" a manufactured article "takes a different form, or at least subserves a different purpose from the original materials and usually it is given a different name."

This implies that it need not be given a different name, and, not only this, that it need not subserve a different purpose or take a different form, the essential thing being that it is not the same article—that it is a new and different article—and that it have a distinctive character from the original.

Or it may mean that, after the original cork had been put through the process, what resulted was the same thing that existed before—that it was not new or different from

what it was before—and that it had no distinctive character. If that was the meaning intended to be conveyed by the statement I submit that it is not true. What resulted was a clean, tasteless, airtight and usable cork. The original cork had neither of these characteristics. That the statement is not true follows necessarily from the consideration that the original cork would not serve the purpose for which the resultant cork was used and the resultant cork did.

I can conceive of no other meaning that can be given to the statement. According, then, to one meaning the epigram was not true and, according to the other, though true, it was of no significance.

This is all I have to say as to the bearing of the decisions relied on by respondents on the question whether the bankrupt was a maker and as to their soundness and that of the reasoning on which they are based.

Was then the bankrupt a maker? The answer to this question depends on what is essential to constitute one a maker. My idea as to this is, perhaps, apparent from what has already been said. In order that one may be a maker it is essential that he be the efficient cause of the coming into existence of something that did not exist. Making involves causality—the production of an effect by a cause—the effect being the existence of a concrete thing. And the causing a concrete thing to exist involves the idea that it is without previous existence. But it does not involve the idea that no part of such concrete thing existed before. This is so because, so far at least as man is concerned, there is no such thing as a making out of nothing. The finite mind can hardly, if at all, conceive of the making of something of which no part existed before. It can only involve the idea that some part thereof was without previous existence. And it would seem to be immaterial as to what part thereof this is true. If some part thereof was without previous existence it is not the same thing as that which previously existed. It is a new and different thing. It is distinctive in character from that which so existed. If this be thought to be too rigid and thoroughgoing it is true, at least, that, if the part thereof which was without previous existence is such as to enable such thing to meet a demand which that which previously existed did not, it is not the same thing but is a new and different thing—is distinctive therefrom in character—and he who is the efficient cause of its existence is the maker thereof. Ordinarily such thing may have a distinctive use from that which previously existed but not essentially so. That which previously existed may not serve the use so effectually or for

some other reason may not meet the demand that there is for that particular thing. Ordinarily it may also have a distinctive name from that which previously existed, but not essentially so. By treatment the cucumber becomes a pickle. Though the pickle has the same outward form as the cucumber it is distinctive in character from the former in internal structure, color and taste. It has a different name. By treatment, also, the seed of the mustard plant becomes a condiment. Here the change is more radical. It is in matter of outward form as well as internally and in color and taste, but the old name is preserved. The condiment is still called mustard. Is it to be said that there is no making in this instance because the new is still called mustard, but there is a making in the other because the new is not still called a cucumber but a pickle? The fact is that in each instance there is a making—the new has parts which were without previous existence—and because it has them it meets a demand which the old does not—and it is immaterial that in the one instance, the old name is preserved and in the other a new one is given.

How then is it in the case in hand? I will not compare the article purchased by the bankrupt with the article produced by it. Probably it cannot be said that there was any making in the restoration of the cherries which it purchased to their original condition before immersion in brine and sulphuric acid to preserve them. I will compare the cherries in their natural condition with the articles produced by the bankrupt. Is it the same thing as the natural cherry? Or is it a new and different thing—a thing distinctive in character therefrom? There can be no question that the first of these two questions must be answered in the negative and the other in the affirmative. The coloring, sweetening, cooking and flavoring—leaving out of consideration the stemming and pitting—to which the natural cherries were subjected by the bankrupt rendered the article produced by it a new and different thing, a thing distinct in character therefrom. It had parts which the natural cherry did not have. It served a purpose which the natural cherries did not serve. In their natural condition the only purpose which they could serve was as an eatable either from the hand or in that best of pies, the ability to make which "in the twinkle of an eye," was the chief accomplishment of Charming Billie's wife. In their artificial condition, as they left the bankrupt's establishment, their chief function was as a garnish, being mainly used, according to counsel for the petitioning creditors, to render the American cocktail "pleasant" or better "a delight to the eyes" though not "to be desired to make one

wise." The article produced by the bankrupt by reason of the existence of such parts met a demand which the natural cherries did not and could not meet. And as the bankrupt was the efficient cause of the existence of such parts it was the maker thereof. On principle I do not see how it is possible to reach any other conclusion. But am I free to dispose of this question in accordance with my view of the matter? Am I not more or less hampered by the decisions relied on by respondents, which I have conceded have a bearing on it, absolutely or conditionally? They are the decisions in the ice cream, the two coffee, the slaughter house, the tailoring, the shell and the cork cases. The last three come from courts whose decisions are controlling on me, to-wit, the Kentucky Court of Appeals and the Supreme Court of the United States, and the ice cream and the two coffee cases have been given standing by citation by such courts, to-wit, by the Kentucky Court of Appeals and by the Sixth Circuit Court of Appeals of the United States. It is possible that the decisions in the two coffee cases and in the tailoring case are the only decisions which have bearing absolutely on the question whether the bankrupt was a maker, as in all the other cases it is possible that the decision therein can be placed on another ground than that the producers of the articles there involved were not makers. I will assume, however, that one and all have bearing absolutely, still I do not think that I am affected by them. If they go to the extent of requiring that the bankrupt be held not to be a maker, then they go to the extent of requiring that it be held that there is no such thing as a maker in any case. In so far as they hold that the producers there involved were not makers they are not sound. They cannot stand the test of just criticism, and as Judge Carroll said expressly in the tailoring case they should not be accepted as authorities in any other case.

To a degree, at least, this case involves a larger question than whether the bankrupt was a maker and hence, a manufacturer, and its establishment a manufacturing establishment. That question is whether preservers and canners who prepare fruits and vegetables for future use are makers and hence manufacturers within the meaning of legislation of the character hereinbefore described, if they have such other characteristics in addition to being makers as may be deemed essential in order that they be such. Indeed, I am not disposed to antagonize the position, which has been assumed in argument, that the question whether the bankrupt was such hangs on the question whether they are such. For I am clear that preservers and canners are makers. By their treatment of the natural

fruits and vegetables they give them qualities or parts which enables them to meet a demand which the natural fruits and vegetables do not and cannot meet. They are the efficient cause of the coming about of the existence of articles which otherwise would not exist. The industry of preserving and canning has come to be one of the great industries of modern times. As I write the day's newspaper contains the following article about it, to-wit:

AN AMAZING INDUSTRY.

(Leslie's Weekly.)

"An idea of the amazing growth of this vital and all important industry may be had when it is told that there are now nearly 4,000 concerns in the country engaged in canning and preserving with an invested capital of $119,207,000. During the last year they paid over $100,000,000 for raw material, and their finished produce was $157,101,000. A case of canned vegetables was turned out for every three men, women and children in that time. Not to mention the fruit and fish, four pounds of condensed milk were put up in 1912 for each inhabitant of the United States. One packing house in Chicago daily cooked canned food sufficient to feed a city of 100,000 population. Think of it.

We now consume 3,000,000,000 cans of food each year, the surplus crop of the country, which, before the art of preserving was perfected, went to waste. It is so stupendous a quantity that if the canning industry were suddenly destroyed, a famine might be created. Certainly it would have an effect on the cost of living, for while that has gone up the price on staple articles in canned food has remained stationary."

If this industry is not to be classed as manufacturing and those who carry it on as manufacturers how are it and they to be classed? An indication of how common usage classes them is to be found in the following article taken from the same issue of the same newspaper, to-wit:

"NEW CATSUP FACTORY.

Special dispatch to the Enquirer.

Petersburg, Ind., April 19.—Yesterday evening the Snider Preserve Company, of Cincinnati, closed the contract with the Business Men's Associaton at Mt. Carmel for the erection of a factory there. The company agrees to manufacture catsup, employ 200 men and women for 10 months a year and expend $40,000 on the site before any

payment be made to them and to expend $35,000 to $40,000 for tomatoes and labor each year."

The question as to how they are to be classed seems never to have been involved in any reported case. At any rate the research of counsel has not been able to find a case involving it. As heretofore stated respondents rely on two dictums in support of their position that such persons are not manufacturers. One is the dried apple analogy referred to by Judge Blatchford in the hay case. It is questionable whether the person who peels, cores, slices and exposes to the sun apples can be said to be the maker of the resulting dried apples. Is not nature the real maker and is not all that he does simply an aid to nature, just as in the case of haymaking, though he renders more assistance than the farmer does in making hay? In the production of India rubber shoes held to be manufacturing in the case of Lawrence vs. Allen, supra, the producer thereof dips the mould in the juice or sap of the caoutchouc tree, resembling milk, and then holds it in the heat and smoke of a fire made by him. This process he repeats several times to produce the shoe. Here the maker makes and manipulates the fire and causes it to dry the juice or sap. In drying apples and making hay there is no manipulation of the sun or of its heat by anyone.

But, however, this may be, the production of dried apples is no one's principal business, so far as I am advised. It is generally a mere incident to housekeeping. It is only as to one whose principal business is that of producing dried apples that the question whether he is a manufacturer can arise.

The other dictum relied on is that of Mr. Justice Brown in the Joseph Schlitz Brewing Company case. But counsel misinterpret Judge Brown's statement on which they rely. He does not say that canning fruits and vegetables is not manufacturing. He is combating the idea that a beer bottle is an ingredient of the beer which it incases, which, as we have seen, was essential in order to entitle the company to a drawback on account of the bottles. He says that the fact that the beer is steamed after being bottled "certainly does not convert a bottle from an incasement into an ingredient." He then likens it to the cases of bottling champagne and other sparkling wines, and Appolinaris and other effervescing waters and of canning fruits and vegetables. The bottling and canning is in all such cases essential to the preservation of the article bottled or canned. And his argument is that as the incasement in all such cases is not an ingredient of that which is incased so the bottles which incase beer

are not an ingredient of the beer which they incase. He was not thinking of the question whether the one who produces canned fruits and vegetables is a manufacturer and hence said nothing on the subject. The inference from what he says in this connection is rather that he regarded him as a manufacturer. His full statement is in these words:

"Thus, champagne and other sparkling wines must be bottled while yet effervescing, or they will lose the 'tang' which gives them their principal value. The same remark may be made of Appollinaris and other effervescing waters, though not manufactured and of certain canned fruits and vegetables which are required to be incased while hot and still in the process of preservation."

In distinguishing Appollinaris and other effervescing waters from Champagne and other sparking wines and possibly beer also, he uses the qualifying clause "though not manufactured," thus implying that they are manufactured. But he does not so distinguish canned fruits and vegetables.

There is, therefore, no dictum against the position that preservers and canners are makers and hence, all other essential characteristics existing, manufacturers. On the other hand there are two dictums in favor of it. In the case of Engel vs. Sohn & Co., 41 Ohio St. 694 the Ohio slaughter house case, Judge Dickman said;

"The occupation of the defendants in error was, we think, essentially that of manufacturers. By the use of tools, implements and mechanical devices, processes, running, some of them through several months; by combination with various materials and ingredients requiring skill, care and attention, products were obtained in the form of pork, lard and cured meats to which may appropriately be applied the term 'manufactured articles.' The original substance, though not destroyed, was so transformed through art and labor, that without previous knowledge it could not have been recognized in the new shape it assumed, or in the new uses to which it was applied. One who produces such results may as correctly be designated a manufacturer as he who buys lumber, and planes, grooves, tongues, or otherwise dresses the same; or as he who by simple process, makes sheets of batting from cotton; or as he who buys fruit and preserves the same by canning—all of whom have been held to be manufacturers and taxed as such under the Internal Revenue Laws of the United States. 9 Internal Revenue Record 193; 5 Id. 180; Internal Revenue Decisions 117, No. 171.

And as to the article of ice to which reference has been made in argument, he is not inappropriately termed a manufacturer who produces artificial ice by the method of vaporization and expansion. The dressed lumber, cotton batting, canned fruits and artificial ice, though but slightly changed from the original material, could not, we think, be properly classified as unmanufactured goods. Indeed the very term manufacturer has been extended to include every object upon which art or skill can be exercised, so as to afford products fabricated by the hand of man or by the labor which he directs. Curtis on Pal Sec. 74."

And in the case of State vs. American Sugar Refining Company, 108 La. Ann. 603 the Louisiana Sugar Refining case, Judge..... said:

"Canning factories which prepare fruits and vegetables for future use without changing the identity of the raw material are manufacturers by the very termed used to designate them."

Besides these two dictums which are precisely in point, the decision in the case of In re Alaska American Fish Company, 162 Fed. 498, is not without decided bearing on the matter. There involuntary bankruptcy proceedings had been brought against a Washington corporation. An objection to its adjudication was made on the ground that it was not principally engaged in manufacturing within the meaning of the Bankruptcy Act of 1898. The business of the corporation consisted of catching and preserving by salt and marketing salt water fish. Judge Hanford overruled the objection and said:

"Fish, as a commodity of merchandise, requires the application of a process for its preservation, as well as labor in packing the same in suitable receptacles for handling and transportation. Therefore, I hold that the business of said corporation was a manufacturing business within the meaning of the bankruptcy act; and that it is subject to be adjudicated a bankrupt."

The case is criticised because only half a dozen lines are devoted to the question, no authorities are cited, and no reasoning advanced for the conclusion and, because the right to adjudicate the corporation a bankrupt might have been based on the ground that it was engaged in a trading and mercantile pursuit. It is urged also that inquiry has elicited that the industry involved is a vast and extensive one and the fish are caught, skinned, boned and cut into pieces so that when ready for market the canned salmon is as different from the fish in its natural state as sliced bacon or other forms of dressed meat are from

the animals from which they are taken. This all may be true, but, as I have already indicated, there is nothing in this different from what is done in preserving and canning fruits and vegetables or was done by the bankrupt at its establishment to bring about a difference in decision. And the support of the case is not needed to sustain the conclusion here reached.

I cannot leave this branch of the case without indicating how it seems to me that a case involving the question whether the producer of a given article is a manufacturer within the meaning of favoring legislation of the character heretofore indicated should be dealt with. It should be accepted at the outset that in order for him to be such it is absolutely essential that he be a maker, or, in other words, that whatever other ideas the word manufacturer may in such legislation embody it at least embodies this idea. This idea should be disentangled from any other possible ideas which the word may embody and the mind concentrated on whether the producer of the article there involved is a maker. This is readily done by treating the question as being not whether he is a manufacturer, but whether he is a maker. If it be determined that he is not a maker that is an end of the case. Not being a maker he cannot be a manufacturer. If it be determined that he is a maker then it should be considered what other ideas are embodied in the word, i. e. have, as it were, been imposed on it, and, if it be determined that other ideas are embodied in it, the conformity of the producer in question to each should be considered separately. Though the necessities of this case do not require that I determine whether other ideas than that he is a maker by hand or by machinery are embodied in the word I feel quite sure that it is not so limited. By this method things are looked at singly and this is a great aid to seeing them as they are. I always had a more vivid conception of what I had seen at the old one ring circus, than what it is possible for one to have of what he sees at the modern two ring circus with a platform performance between. Indeed singlemindedness is essential to seeing things as they are. But to avoid misconception I would note that singlemindedness is not the same as a "single track mind." Mathew Arnold, who represented truth as a "Mysterious Goddess," wrapped in a black robe, and said that we shall never see her except in outline, seems to have had such a mind in view when he said further that the only way to gain a vision of truth "thus even in outline" is "to try and approach" her "on one side after another, not to

strive or cry, nor persist in pressing on any one side with violence and self will" and that "he who will do nothing but fight impetuously towards her on his own, one, favorite, particular line is inevitably destined to run his head into the folds" of her robe.

This suggestion which I have made as to dealing with such a case may be an Ariadne's thread or a mare's nest. As to which it may be is for others to judge.

I must also add that one in dealing with such a case should be sure of his analogies and his epigrams. If he does not look out they will lead him astray.

This brings me to the other position taken on behalf of respondents and which seems to be mainly relied on. It is that the statute in question has to do not with manufacturing establishments, but only with such as are like the two specified, to-wit, rolling mill and foundry, and the bankrupt's establishment, assuming it to have been a manufacturing establishment at all, was not such an one. They would apply here what is called the rule of ejusdem generis or, in recognition of its origin, Lord Tenterden's rule. It is sometimes termed a doctrine. It is thus stated by Lord Tenterden himself in the case of Sandiman vs. Breach. 7 B. & C. 96.

"Where general words follow particular ones, the rule is to construe them as applicable to persons ejusdem generis."

Mr. Justice Brewer in the case of United States vs. Mescall, 215 U. S. 31, puts it thus:

"Where particular words of description are followed by general terms, the latter will be regarded as referring to things of a like class with those particularly described—ejusdem generis."

Here the particular words "any rolling mill, foundry" are followed by the general term "or other manufacturing establishment." The case, therefore, respondents contend, is one calling for the application of this rule or doctrine and applying it thereto. The general term should be construed as if it were "or other such like manufacturing establishment" in which case there could be no question that it did not include all manufacturing establishments, but only such as are like a rolling mill and foundry.

One called on to apply this rule or doctrine should, before attempting to do so, understand exactly the reasoning on which it is based and the essentials to its application. The case of Newport News, etc., Co. vs. United States, 61 Fed. 488, where the rule or doctrine was undoubtedly correctly applied affords a good illustration to

bring out these matters. It involved the federal statute forbidding carriers of animals to confine them more than twenty eight consecutive hours without unloading for rest, water and feeding, unless prevented by "storm or other accidental causes." It was held that failure to unload is excused only by accidental causes, which, like storms, are unavoidable and not by an accident to a train. Judge Lurton said:

"The meaning of the general words 'other accidental causes' must be ascertained by referring to the preceding special words. * * * A storm is unavoidable in the sense that it cannot be prevented. 'Other accidental causes' must be taken to mean 'other unavoidable accidental causes.'"

Literally the words "by storm or other accidental causes" mean exactly the same thing as if the words used had been "by accidental causes." In other words each clause literally includes all accidental causes, one no more than the other. The only difference is that the latter expression is the simpler one of the two. To hold that the former includes only a storm or other unavoidable accidental cause is to give it a meaning other than its literal meaning. To give it such a meaning literally and to express it more accurately it should be made to read "by storm or other unavoidable accidental cause" or more simply "by unavoidable accidental causes." The requirement of the rule or doctrine, therefore, is that the words used should be given a meaning other than their literal meaning, a meaning which they do not express as accurately as they could have been made to express. The idea behind the rule or doctrine and which brought about its formulation is that if the legislature had intended to include all accidental causes it would have used the general words and made no specification at all. In the case of Rex. vs. Inhabitants of Whitmarsh, 7 B. & C. 596, decided in the same year (1827), when Lord Tenterden stated his rule, where it was held that a statute providing that "no tradesman, artificer, workman or other person whatsoever, shall do or exercise any worldly labor, business or work of their ordinary calling upon the Lord's day or any part thereof (work of necessity and charity only excepted)" did not apply to a contract of hiring made with a farm hand upon Sunday, Bayley, J., said:

"If the Legislature had intended to embrace every description of persons and every species of business, it would not have been necessary to make an enumeration of several classes of persons exercising particular descrip-

tions of labor or business. It would have been sufficient to say that no person whatever should do any work or business on the Lord's day. If the enactment had been intended to be general the legislature would have used general words."

Littledale, J., said:

"If it, (Parliament) had intended that no person should do any work on a Sunday it would have used different language." In applying the rule, therefore, the interpreter, in his critical mood, judges the legislature by himself. He says to himself that if he had been writing the statute in question, e. g. the statute involved in the case taken as an illustration, and had intended to include all accidental causes he would have said "by accidental causes" and would not have said "by storm and other accidental causes." That was the simplest and, therefore, the logical way to express the thought, and it should be assumed that the legislature would in that contingency have acted logically. We have here an instance of what has been characterized in connection with the subject of historical criticism as a "methodological assumption" And it has been questioned whether historical critics are not "too prone to rest content with the assumption that the logical thing is right?" It is thus a weakness of the rule or doctrine in question that it overlooks the fact that a legislature may not always express its meaning as it should logically do. And it has this still further weakness that though, if it had been the intention to include all accidental causes the logical thing would have been to use the words "by accidental causes" as the simpler expression, and that, therefore, it was illogical not to use them, on the basis that the intention was to include only unavoidable accidental causes, the more accurate and therefore the more logical thing to do was to use the words "by unavoidable accidental causes" or "by storm and other unavoidable accidental causes" and not to use the words "by storm and other accidental causes." Wherever, then, the rule or doctrine is applied a meaning is given to the words used by the legislature which they do not logically express and that because had it intended to express the other meaning it would have expressed itself logically.

So much then as to the reasoning on which the rule or doctrine is based and in criticism of it.

As to what is essential to its application apparently all that is required is that "general words follow particular ones" or that "particular words are followed by general

terms." But something more is essential than this. The persons or objects covered by the particular words must belong to a subordinate class of persons or objects within the class covered by the general words and they must not exhaust all the persons or objects belonging to such subordinate class. Two things then are essential. There must be a class within a class. And the former must not be full. That which the rule or doctrine does is not to eliminate the general words from the statute, but to restrict their meaning. And this it cannot do unless there is both a subordinate class within the class covered by them and such class is not full. A case where this position is enforced is that of United States vs. Meschall, supra. The statute there involved provided that "if any owner, importer, consignee, agent or other person shall make or attempt to make any entry of imported merchandise" by certain means specified "such merchandise shall be forfeited * * * and such person shall upon conviction be fined, &c." The question was whether an employee in the customs service who had made an entry of imported merchandise in the manner prohibited could be fined under the statute. It was held that he could even though he had no goods that could be forfeited. Mr. Justice Brewer stated the position taken against the right to punish him in these words:

"The particular words of description, it is urged are 'owner, importer, consignee, agent.' The general term is 'other person' and should be read as referring to some one similar to those named, whereas the defendant was not owner, importer, consignee or agent or of like class with either."

And the basis of the decision was that there was no one of like class with either to whom the general term could apply and unless it was given its literal meaning it would be meaningless. He quoted with approval this language from a certain Missouri decision:

"Where the particular words exhaust the class, the general words must be construed as embracing something outside of that class. If the particular words exhaust the generis, there is nothing ejusdam generis left, and in such case we must give the general words a meaning outside of the class indicated by the particular words, or we must say that they are meaningless and thereby sacrifice the general to preserve the particular words. In that the rule would defeat its own purpose."

The case of United States vs. Celluloid, 82 Fed. 627, relied on by respondents can hardly stand against this decision.

It seems to me that it is essential also that it should be obvious that there is a subordinate class to which the persons or objects covered by the particular words belong and which is not exhausted thereby, and, at least, that it should not have been unreasonable for the legislature to restrict the legislation to such subordinate class. I do not know what the cases yield on the subject, but I have an idea that the rule should never be applied unless the restriction is one which it appears it was reasonable to make.

The respondents contend that this case meets all requirements. The subordinate class which it is claimed the legislature had in mind were iron manufactories to which rolling mills and foundries belong and which is not exhausted thereby. I have not been advised on the subject of the various iron manufactories and have no special knowledge thereon myself. I have an idea that rolling mills and foundries have to do with a manufactured product, to-wit: pig iron, which is manufactured from the ore in furnaces or smelters and that there are other iron manufactories having also to do with this manufactured product or with the manufactured product of the rolling mills and foundries. But is it reasonable to hold that the legislature could have intended to limit the statute to iron manufactories? What possible reason was there for making such limitation? It must, however, be accepted as rather singular that the legislature if it had in mind all manufactories, singled out only two kinds of iron manufactories for specification. The statute was originally enacted March 20th, 1876. As originally enacted it covered only "any railroad company, or an owner or operator of any rolling mill, foundry or other manufacturing establishment." In 1893 it was made to cover also any turnpike, canal or other public improvement company and in 1894 any mine company. On the same date of its original enactment the legislature provided for the compilation and publication of "A general account of the agricultural, commercial and mineral resources of the Commonwealth of Kentucky" by the Kentucky State Bureau of Agriculture for distribution to emigrants and emigrant societies. Counsel for respondents make certain quotations from this document. I do not have it before me, nor does the date of its publication appear. Probably it was published in 1876 before or at the time of the Centennial Exposition

at Philadelphia. It appears from those quotations that it was then thought that there were "unexhaustible beds of iron ores in various parts of the state" and that amongst other things desired to be accomplished by the publication of this account was the mining of those ores and the establishment of iron manufactories in the state. It is the contention that the legislation in question in so far as it related to manufacturing establishments had in view this same end. But the legislation is not legislation favoring any manufacturing establishment as legislation exempting from taxation does. It is legislation favoring the employees of the manufacturing establishments to whom it relates and persons who furnish them materials and supplies. In the former particular it is in line with legislation everywhere. It is rather unique in favoring persons who furnish materials and supplies. Why then should the legislature single out the employees of and persons furnishing materials and supplies to iron manufacturers for so favoring and omit to favor the employees of and persons furnishing materials and supplies to other manufacturers? No conceivable reason occurs to me for making such a distinction. Such a limitation is so unreasonable as to be of itself a consideration against the application of the rule in this instance. Besides though at the time of the original enactment of the statute it seems to have been thought that there were such beds of iron ores in various parts of the state which it was desirable to have mined, it has long since been ascertained that such beds as there are are not capable of being profitably mined. If there is now or for many years has been any iron ore mining in the state I am not informed as to it. And since this condition of things has been definitely ascertained the original statute has been twice re-enacted. It was re-enacted in 1893, at the long session of the legislature after the adoption of the present constitution of the state, and again on February 29th, 1904 by the adoption of Carroll's 1903 Edition of the Kentucky Statutes.

But there is a conclusive consideration against limiting the statute as is claimed on behalf of the respondents it should be. The decisions so cited which apply the rule of ejusdem generis recognize that it should not be applied where there is something in the context against its application. There is something in the context of this statute which shows beyond question that it was the thought of the legislature to include all manufacturing establishments. The article containing the statute and and other relevant provisions is entitled as follows:

"Railroads, Other Improvements and Manufacturers —Liens of Employes and Others On."

This title is not simply the work of the compiler of the Kentucky Statutes. It is the work of the legislature also. It became so by the adoption in 1904 of Carroll's 1903 Edition of Kentucky Statutes as above stated. In this title occurs the general word "Manufacturers" without any limitation whatever. It clearly indicates that it was the thought of the legislature to include in the following statutory provisions all manufacturers whatever.

I have thus far considered the question as one of principle without reference to the effect thereon of any relevant decisions. I have so done because it is the contention of respondents that the question has not been foreclosed by any such decision but is still an open one.

The relevant decisions are not few in number. They are as follows:

Winter vs. Howell, 109 Ky., 163
Bogard vs. Tyler, 55 S. W., 709
Muir vs. Samuels, 110 Ky., 605
Graham vs. Magann Lumber Co., 118 Ky., 192
Hall & Son vs. Guthrie Sons, Assignee, 103 S. W., 721
In Re Stark-Ullman Saddlery Company, 171 Fed. 592
In Re Bennett, 153 Fed., 673
In Re Stark-Ullman Saddlery Company, 171 Fed. 834

In no one of these cases was the manufacturing establishment in question an iron manufactury. In Winter vs. Howell it was an establishment where mixed paints and cut-offs for cisterns were made; in Bogard vs. Tyler and Graham vs. Magann Lumber Company, a saw-mill; in Muir vs. Samuels, a laundry; in Hall & Son vs. Guthrie Sons, Assignee, a flour mill; in Re Falls City Shirt Manufacturing Company a shirt manufactory; in In Re Bennett, a barrel factory; and In Re Stark-Ullman Saddlery Company, a horse leather factory. In the cases of Winter vs. Howell, Bogard vs. Tyler, Muir vs. Samuels and in Re Stark-Ullman Saddlery Company the lien claimed under the statute was denied. But it was not denied on the ground that the establishment in question was not a manufacturing establishment within the meaning of the statute, except in Muir vs. Samuels, and, it was so denied there, not on the ground that it was not an iron manufactory, but on the ground, as we have seen, that a laundry is not a manufacturing establishment. It

was assumed that the statute covered all manufacturing establishments. In the other four cases there was no question that the establishment was a manufacturing establishment. In each of them, except Bogard vs. Tyler, it was assumed that the statute covered all manufacturing establishments and hence the particular establishment involved therein. In Bogard vs. Tyler the question was expressly raised and determined that the statute covered a sawmill. Judge Durelle said:

"Numerous questions are made as to the proper construction of the act of February 25, 1893, relied on as giving a lien in favor of the employes and materialmen. These questions, however, in our view, need not be considered except the question whether the statute applies in this case. The lien being statutory, all the conditions upon which it is predicated must exist. There must be a manufacturing establishment; and under the evidence in this case, as the sawmill was engaged in manufacturing lumber for the market, we think there was."

He then stated the several contingencies on which the lien under the statute was to attach and held that none of them had happened. It was on this ground alone that the lien was denied. In Winter vs. Howell the lien was enforced in the lower court to a certain extent. All the Court of Appeals did was to deny its enforcement to any greater extent. In the cases of Graham vs. Magann Lumber Co., Hall & Son vs. Guthrie Sons, Assignee, Re Falls City Shirt Manufacturing Company and In re Bennett the lien was enforced. In none of them except in that of Hall & Son vs. Guthrie Sons, Assignee, was the question raised as to whether the statute covered the particular manufacturing establishment therein involved. In the other three cases it was simply assumed that it did. In the case of Hall & Son vs. Guthrie's Sons, Assignee, the question was raised as to whether the statute covered a flour mill and it was decided in the affirmative. Judge Nunn said;

"The mill of Guthrie's Sons was a manufacturing establishment in the meaning of this section. In the case of Muir vs. Samuels * * * this court determined that a laundry was not a manufacturing establishment in the meaning of that section for the reason that it only changed dirty linen into clean linen. The article was a complete one before and after it was laundered. In the case of Bogard vs. Tyler * * * It was held that a sawmill was a manufacturing establishment because it manufactured lumber from logs. The mill in this case changes wheat into flour."

The ground upon which it is claimed that the decisions in these four cases do not foreclose the question is that it was not claimed in any one of them that the rule of ejusdem

generis applied and applying it the statute should be limited to iron manufactories and hence this precise question was not decided. In order for a prior decision to be a precedent as to any question, it is argued, that it must be raised and decided. It is not sufficient that it was directly involved.

In the case of Celluloid Manufacturing Company vs. Tower, 26 Fed., 451, Judge Carpenter said;

"No decision, as it seems to us, can amount to a precedent unless made after full argument."

In the case of Carroll vs. Lessee of Carroll, 16 How., 275, it was said;

"There must have been an application of the judicial mind to the precise question necessary to be determined."

And in the case of Boyd vs. Alabama, 94 U. S., 645, it was held that a court was not precluded by having enforced a statute from thereafter considering its constitutionality.

But I think that the fact that in Bogard vs. Tyler the question as to whether a sawmill and in Hall & Son vs. Guthrie's Sons, Assignee, the question as to whether a flour mill was a manufacturing establishment within the statute was expressly raised and so determined, though the bearing thereon of the rule of ejusdem generis was not suggested or considered, makes them binding precedents in support of the position that the statute covers all manufacturing establishments. I do not think that Judge Lurton in the case of In re Stark-Ullman Saddlery Company recognized the question as open and undetermined. Priority was there denied because the indebtedness was not incurred on the manufacturing side of the bankrupt's business. On the contrary it does not seem to have occurred to Judge Lurton that there was any question as to the statute not covering all manufacturing establishments. He said;

"The statute is plain enough. The purpose is to give a lien under certain circumstances to persons furnishing materials and supplies for the carrying on of the manufacturing business in which the debtor was engaged * * * The statute was before us in the case styled In re Bennett, 153 Fed., 673; but the claims then involved were undisputably for materials and supplies, furnished for the carrying on of an undisputable manufacturing business."

But how does it happen that in all these cases it never occurred to the lawyers or the court that the statute could have a limited meaning in this particular? It can be accounted for on two grounds. One is the use of the unlimited word "manufacturers" in the title and the other is the total absence of any reason for limiting a statute favoring employes and material men to iron manufactories. The latter consideration was suf-

ficient of itself to prevent its occurring to them that the statute could have such a limited meaning. It would have been unreasonable to so limit it.

I am, therefore, clear both on principle and authority that the statute is not limited to iron manufactories.

The order of the referee is, therefore, reversed and the cause remanded with directions to give priority to the petitioning creditors.

A. M. J. Cochran,
Judge.

June 16, 1913.

ORDER REVERSING ORDER OF REFEREE.

(Entered Aug. 21, 1913, by A. M. J. Cochran, Judge.)

This cause came on to be heard upon the petition of George Lueders & Company and G. S. Nicholas & Company, by Messrs. DeCamp & Sutphin, their attorneys, and upon the petition of D. A. White Company, The E. Berghausen Chemical Company, The E. A. Conkling Box Company, T. A. Decker, B. F. Goodrich Company and Hazel-Atlas Glass Company, by Messrs. Burch, Peters & Connolly, their attorneys, filed on behalf of the said petitioners and other creditors similarly situated, who had filed claims for lien under and by virtue of Sections 2486 and 2491 of the Kentucky statutes, to review the decision and order of Honorable Martin M. Durrett, Referee in Bankruptcy, disallowing the claims of said petitioners as lien claims upon the certificate of said Referee as to the questions of law and fact presented, and upon the evidence relating thereto, and was duly argued by counsel and submitted to the court, upon consideration whereof the court delivered a written opinion which was filed herein June 16, 1913, in which it found that the decision and order of said Referee was erroneous;

And thereupon the court finds that the bankrupt maintained and operated a manufacturing establishment within the meaning of the Kentucky Statute aforesaid; that said statute is not contrary to nor in conflict with the provisions of the United States Bankruptcy Act of July 1, 1898, entitled, "An Act to establish a uniform system of bankruptcy throughout the United States," and the several amendments thereto; that said statute is not contrary to nor in conflict with the provisions of the Constitution of the United States; that said statute is not unjust, discriminatory nor otherwise void, and does not deny the objectors herein, or any other creditors, the equal protection of the laws, nor deprive any person of property without due process of law and is not in said respects nor otherwise contrary to nor in conflict with the Fourteeenth Amendment of the Constitution of the United States; and that each and every of the objections of the Central Trust Company of Illinois to the claims for liens of said petitioning creditors and others, heretofore filed herein by said Central Trust Company of Illinois, and Covington Savings Bank and Trust Company, as trustee, are insufficient and immaterial;

And thereupon it is Ordered, Adjudged and Decreed that each and every of the objections, heretofore presented and filed herein, be and the same are hereby overruled, and that the order of said Referee in Bankruptcy, disallowing said claims as lien claims, be and the same is hereby reversed, and this cause is remanded, with directions to the said Referee to finally allow the claims of George Lueders & Company for $1569.32, G. S. Nicholas & Company for $1616.17, D. A. White Company for $9121.02, The E. Berghausen Chemical Company for $642.41, The E. A. Conkling Box Company for $1293.28, T. A. Decker for $1114.72, B. F. Goodrich Company for $300.92 and Hazel-Atlas Glass Company for $3510.94, and those of other creditors similarly situated, for materials and supplies furnished the bankrupt for the purpose of carrying on its business, as the Referee may determine as prior lien claims upon so much of the property and effects of such bankrupt as may have been involved in such business and all accessories connected therewith, including the interest of said bankrupt in the real-estate used in carrying on such business, to all of which the Central Trust Company of Illinois and Covington Savings Bank and Trust Company, of Covington, Kentucky, as trustee, except.

Dated, Aug. 21st, 1913.

A. M. J. Cochran,
District Judge.

PETITION FOR APPEAL.

(Filed Aug. 21, 1913.)

To the Honorable A. M. J. Cochran, District Judge of the United States, for the Eastern District of Kentucky:

Central Trust Company of Illinois and Covington Savings Bank and Trust Company, as trustee, conceiving themselves aggrieved by the final order and decree entered herein on the.....day of ..... 1913, allowing the claims of certain lien claimants and others similarly situated, for liens, under Sections 2486 and 2491 of the Kentucky Statutes, do hereby pray and appeal from the said order and decree to the United States Circuit Court of Appeals for the Seventh Circuit, for the reasons specified in the Assignment of Errors filed herewith; and pray that this appeal may be allowed and that a citation may issue directed to the said lien claimants, and that a transcript of the record, proceedings and evidence, upon which said order is based, duly authenticated, may be transmitted to the United States Circuit Court of Appeals for the Sixth Circuit, and further pray that the amount of the appeal bond be fixed by the honorable court.

Rosenthal & Hamill,
Attorneys for Central Trust Company of Illinois.

Harmon, Colston, Goldsmith & Hoadly,
Attorneys for Covington Savings Bank and Trust Company, as Trustee.

ASSIGNMENT OF ERRORS.

(Filed Aug. 21, 1913.)

Now comes Central Trust Company of Illinois and Covington Savings Bank and Trust Company, as trustee, praying an appeal herein, and file the following assignment of errors:

First: The order made and entered herein on the .....day of....., 1913, allowing claim for liens, in erroneous and against the just rights of the appellants herein.

Second: The court erred in finding that the creditors who had filed claims for lien under and by virtue of Sections 2486 and 2491 of the Kentucky Statutes, were entitled to such liens and to preference and priority over other creditors of the bankrupt.

Third: The court erred in finding that the bankrupt maintained and operated a manufacturing establishment within the meaning of the Kentucky Statutes aforesaid.

Fourth: The court erred in finding that the said Kentucky Statute applied to all manufacturing establishments.

Fifth: The court erred in finding that the said Statute was applicable to the business of the bankrupt or the transactions between the said lien claimants and the said bankrupt.

Sixth: The court erred in adjudging that the said Kentucky Statute is not contrary to nor in conflict with any of the provisions of the United States Bankruptcy Act of July 1, 1898, entitled "An Act to establish a uniform system of bankruptcy throughout the United States," and the several amendments thereto.

Seventh: The court erred in adjudging that said Kentucky Statute is not contrary to nor in conflict with any of the provisions of the Constitution of the United States.

Eighth: The court erred in adjudging that said Statute is not unjust, discriminatory, nor otherwise void.

Ninth: The court erred in adjudging that said Statute is not void as denying to general unsecured creditors of the bankrupt and said Central Trust Company of Illinois the equal protection of the laws under the Fourteenth Amendment to the Constitution of the United States.

Tenth: The court erred in adjudging that said Kentucky Statute is not in conflict with nor void under the Fourteenth Amendment of the Constitution of the United States.

Eleventh: The court erred in adjudging that said Kentucky Statute does not deprive Central Trust Company of Illinois and other creditors of their property without due process of law under the Fourteenth Amendment to the Constitution of the United States.

Twelfth: The court erred in adjudging each and every of the objections to said claims for lien, heretofore filed herein by said Central Trust Company of Illinois and Covington Savings Bank and Trust Company, as trustee, insufficient and immaterial and in overruling the said objections.

Thirteenth: The court erred in allowing the claims for lien herein.

Fourteenth: The court erred in reversing the order of the Honorable Martin M. Durrett, Referee in Bankruptcy, disallowing the claims for lien.

Fifteenth: The court erred in ordering, adjudging and decreeing that the order of said Referee in Bankruptcy disallowing said claims as lien claims be reversed, and in remanding the cause, with directions to the said Referee to finally allow the claims therein specified for materials and supplies furnished the bankrupt for the purpose of carrying on its business, as prior lien claims upon so much of the property and effects of said bankrupt as may have been involved in said business, and all accessories connected therewith, including the interest of said bankrupt in the real estate used in carrying on such business.

Wherefore, the said Central Trust Company of Illinois and said Covington Savings Bank and Trust Company, as trustee, pray that the said Judgment may be reversed and the said claims for liens be disallowed.

Central Trust Company of Illinois,
By Rosenthal & Hamill,
Its Attorneys.

Covington Savings Bank and Trust Company,
as Trustee,
By Harmon, Colston, Goldsmith & Hoadly,
Its Attorneys.

ORDER ALLOWING APPEAL.

(Entered Aug. 21, 1913, by A. M. J. Cochran, Judge.)

Now comes Central Trust Company of Illinois and Covington Savings Bank and Trust Company, as Trustee, by their respective attorneys, and present their assignment of errors and petition for appeal from the order entered herein on the 21 day of August, 1913, to the United States Circuit Court of Appeals for the Sixth Circuit, whereupon the court being fully advised in the premises, grants said petition for appeal, and fixes the appeal bond at the sum of Three hundred dollars ($300.00).

Dated the 21st day of August, 1913.

A. M. J. Cochran,
District Judge.

ORDER IN RE TESTIMONY EDGAR MARTIN LEWIS.

(Enetered Aug. 23, 1913, by A. M. J. Cochran, Judge.)

Upon the request of the Central Trust Company of Illinois and The Covington Savings Bank & Trust Company, and it appearing to the court that good reason exists therefor, It Is Ordered That in making up the record upon appeal herein the testimony of Edgar Martin Lewis, taken before the Referee in the above entitled cause, be set forth in full in the words of the witness as the same was taken before the Referee.

A. M. J. Cochran,
United States District Judge for the
Eastern District of Kentucky.

Apr. 21, 1913.

APPEAL BOND.

(Filed Aug. 21, 1913.)

Know All Men by These Presents:

That We, Central Trust Company of Illinois, as principal, and The United States Fidelity & Guaranty Company, as surety, are held and firmly bound unto George Lueders & Co., G. S. Nicholas & Co., D. A. White Co., The E. Berghausen Chemical Co., The E. A. Conkling Box Co., T. A. Decker, B. F. Goodrich Co. and Hazel-Atlas Glass Co., in the full and just sum of Three Hundred Dollars ($300.00) to be paid to the said George Lueders & Co., G. S. Nicholas & Co., D. A. White Co., The E. Berghausen Chemical Co., The E. A. Conkling Box Co., T. A. Decker, B. F. Goodrich Co. and Hazel-Atlas Glass Co., and their executors, administrators, successors or assigns severally, we do hereby bind ourselves and our successors, jointly and severally, by these presents.

The condition of this obligation is such that Whereas at a District Court of the United States for the Eastern District of Kentucky, in a suit pending in said Court between said George Lueders & Co., G. S. Nicholas & Co., D. A. White Co., The E. Berghausen Chemical Co., The E. A. Conkling Box Co., T. A. Decker, B. F. Goodrich Co. and Hazel-Atlas Glass Co. and said Central Trust Company of Illinois, a decree was rendered against the said Central Trust Company of Illinois, and the said Central Trust Company of Illinois having obtained the allowance of an appeal from said decree:

Now, Therefore, If the said Central Trust Company of Illinois shall prosecute said appeal to effect, and shall answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

In Testimony Whereof, We have hereunto set our hands and seals this 21st day of August, nineteen hundred and thirteen (1913).

Central Trust Company of Illinois,
By Geo. Hoadly,
Its Attorney.

(Seal.) United States Fidelity and Guaranty Company,
By Harry B. Hupp,
Attorney in Fact.

Approved By:
A. M. J. Cochran,
District Judge.

CITATION.

(Filed Aug. 21, 1913.)

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

United States of America, Sixth Judicial Circuit, ss:

To George Lueders & Co., G. S. Nicholas & Co., D. A. White Co., The E. Berghausen Chemical Co., The E. A. Conkling Box Co., T. A. Decker, B. F. Goodrich Co., and Hazel-Atlas Glass Co.
Greeting:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of appeals for the Sixth Circuit, to be holden at the City of Cincinnati, in said Circuit, within thirty days from the date hereof, pursuant to an Appeal, filed in the Clerk's Office of the District Court of the United States for the Eastern District of Kentucky, wherein Central Trust Company of Illinois and The Covington Savings Bank and Trust Company as Trustee, are appellants, and you are appellee, to show cause, if any there be, why the decree rendered against the said appellants as in the said Appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward Douglass White Chief Justice of the United States, this 21st day of August in the year of our Lord one thousand nine hundred and thirteen, and of the Independence of the United States of America the one hundred and thirty-eighth.

A. M. J. Cochran,
United States District Judge, Eastern District of Kentucky.

Service of the within citation is hereby accepted, this 21st day of August, 1913.

DeCamp & Sutphin,
Burch, Peters & Connolly,
Attorneys for Appellees.

STIPULATION.

(Filed Aug. 21, 1913.)

It is hereby stipulated and agreed by and between the appellants, Central Trust Company of Illinois, by Rosenthal and Hamill, its attorneys, and The Covington Savings Bank and Trust Company, as Trustee, by Harmon, Colston, Goldsmith & Hoadly, its attorneys, and the appellees, George Lueders & Company and G. S. Nicholas & Company, by DeCamp & Sutphin, their attorneys, and D. A. White Company and others, by Burch, Peters & Connolly, their attorneys, that a transcript of the record upon the appeal from the order entered by the United States District Court for the Eastern District of Kentucky on the 20th day of August, 1913, to the Circuit Court of Appeals for the Sixth Circuit, shall consist of the following:

1. The proof of debt and claim for lien of George Lueders & Company for $1569.33, filed with Martin M. Durrett, Referee, on the 6th day of May, 1912.

2. The proof of debt and claim for lien of D. A. White Company for $9121.02, filed with Martin M. Durrett, Referee, on the 8th day of May, 1912.

And it is stipulated and agreed by and between the parties hereto that the said proofs of debt and claims for lien (referred to in Items one and two of this stipulation) are similar in substance and in form to all proofs of debt and claims for lien filed herein by other creditors claiming liens under Sections 2486 and 2491 of Kentucky Statutes, and are truly representative of the said claims.

3. The proof of debt of Central Trust Company of Illinois for $7832.73, filed with Martin M. Durrett, Referee on the 6th day of May, 1912.

4. Objections of Central Trust Company of Illinois, in which Covington Savings Bank and Trust Company, as trustee, joined, to the claims of said George Lueders & Company, and D. A. White Company, filed with Martin M. Durrett, Referee, on the 31st day of August, 1912. And it is stipulated and agreed by and between the parties hereto that the said objections to the claim for lien of said George Lueders & Company and D. A. White Company are identical with the objections filed by said Central Trust Company of Illinois and joined in by said Covington Savings Bank and Trust Company, as Trustee,

to the claims for lien of all other creditors claiming such liens.

5. Testimony of Edgar Martin Lewis before Martin M. Durrett, Referee, on November 4, 1912.

6. The third paragraph of the Articles of Incorporation of The I. Rheinstrom & Sons Company (bankrupt), an Ohio corporation, dated March 3, 1999, as per stipulation of August 21, 1913.

7. Findings and order of Martin M. Durrett, Referee, entered November 18, 1912, upon the objections to the claims for lien, allowing said claims as general unsecured claims and disallowing said claims as lien claims.

8. Petition of George Lueders & Company for review of order entered by Martin M. Durrett, Referee, on November 4, 1912.

9. Petition of D. A. White Company and others for review of order entered by Martin M. Durrett, Referee, on November 4, 1912.

10. Order of Judge A. M. J. Cochran entered August 21st, 1913, reversing the order of Referee, and allowing claims for lien.

11. Petition of Central Trust Company of Illinois and The Covington Savings Bank and Trust Company, as Trustee, for appeal.

12. Assignment of errors.

13. Order allowing apeal.

14. Order directing the testimony of Edgar Martin Lewis to be incorporated in the record in the words of the witness.

15. Appeal bond.

16. Citation.

17. Stipulation as to contents of the transcript of the record.

Central Trust Company of Illinois,
By Rosenthal & Hamill,
Its Attorneys.

Covington Savings Bank and Trust Company,
By Harmon, Colston, Goldsmith & Hoadly,
Its Attorneys.

George Lueders & Company and
G. S. Nicholas & Company,
By DeCamp & Sutphin,
Their Attorneys.

D. A. White Company et al.,
By Burch, Peters & Connolly,
Their Attorneys.

CLERK'S CERTIFICATE.

(Filed Aug. 26, 1913.)

United States of America, Eastern District of Kentucky, ss.

I, J. W. Menzies, Clerk of the United States District Court for the Eastern District of Kentucky, at Covington, do hereby certify that the foregoing.....pages contain a full, true and correct copy of the proceedings in Bankruptcy case of The Rheinstrom & Sons Company No. 834, as called for by the stipulation set out in full herein, as the same appears from the records and files of this office.

Witness my hand as clerk and the seal of said court, at Covington, Ky., this 15th day of September, A. D. 1913, and of the Independence of the United States of America the 138th year.

(Seal)

J. W. Menzies,
Clerk.

Proceedings in the United States Circuit Court of Appeals for the Sixth Circuit.

Appearance of Counsel.

(Filed Sept. 22, 1913.)

#2539.

CENTRAL TRUST COMPANY et al.
vs.
GEORGE LUEDERS & COMPANY et al.; In re RHEINSTROM & SONS COMPANY.

Frank O. Loveland, Clerk of said Court:

Please enter *my* appearance as counsel for the Appellants.

HARMON, COLSTON, GOLDSMITH & HOADLY,
Attorneys for The Covington Savings Bank & Trust Company, Trustee, Appellants.
LESSING ROSENTHAL,
CHARLES H. HAMILL,
LEO F. WORMSER,
Attorneys for Appellant Central Trust Company of Illinois.

Entry—Cause Argued.

(Jan. 7, 1915.)

Before Knappen and Denison, Circuit Judges, and Sater, District Judge.

United States Circuit Court of Appeals for the Sixth Circuit.

#2539.

CENTRAL TRUST COMPANY OF ILLINOIS et al.
vs.
GEORGE LUEDERS & CO. et al.

This cause is argued in part by Mr. Leo F. Wormser for the Appellant and is continued until tomorrow for further argument.

Entry—Cause Argued and Submitted.

(Jan. 8th, 1915.)

United States Circuit Court of Appeals for the Sixth Circuit.

#2539.

CENTRAL TRUST COMPANY OF ILLINOIS et al.
vs.
GEORGE LUEDERS & Co. et al.

This cause is further argued by Mr. Leo F. Wormser for the Appellant and by Mr. Dudley V. Sutphin for the Appellee and is submitted to the court.

Decree.

(Filed and Entered March 2, 1915.)

United States Circuit Court of Appeals for the Sixth Circuit.

#2539.

CENTRAL TRUST COMPANY OF ILLINOIS and THE COVINGTON SAVINGS BANK AND TRUST CO., as Trustee,
vs.
GEORGE LUEDERS & Co. et al.

Appeal from the District Court of the United States for the Eastern District of Kentucky.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Kentucky, and was argued by counsel.

On Consideration Whereof, It is now here ordered, adjudged and decreed by this Court, that the decree of the said District Court in this cause be and the same is hereby affirmed with costs.

Opinion.

(Filed March 2, 1915.)

Filed Mar. 2, 1915. Frank O. Loveland, Clerk.

United States Circuit Court of Appeals, Sixth Circuit.

No. 2539.

CENTRAL TRUST COMPANY OF ILLINOIS and THE COVINGTON SAVINGS BANK AND TRUST COMPANY, as Trustee, Appellants,
vs.
GEORGE LUEDERS & Co. et al., Appellees.

Appeal from the District Court of the United States for the Eastern District of Kentucky.

Submitted January 8, 1915; Decided March 2, 1915.

Before Knappen and Denison, Circuit Judges, and Sater, District Judge.

KNAPPEN, *Circuit Judge:*

This is an appeal from the order of the district court allowing the claims of the appellees against the bankrupt estate as prior lien claims upon the property and effects of the bankrupt, by virtue of section 2487 of the Kentucky statutes. The statute is printed in the margin of this opinion[1].

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[1] "SEC. 2487. Lien of employes and material men on property assigned for the benefit of creditors. When the property or effects of any [mine] railroad, turnpike, canal or other public improvement company, or of any owner or operator of any rolling mill, foundry or other manufacturing establishment, whether incorporated or not, shall be assigned for the benefit of creditors, shall come into the hands of any executor, administrator, commissioner, receiver of a court, trustee or assignee for the benefit of creditors, or shall in any wise come to be distributed among creditors, whether by operation of law or by the act of such company, owner or operator, the employes of such company, owner or operator in such business, and the persons who shall have furnished materials or supplies for the carrying on of such business, shall have a lien upon so much of such property and effects as may have been involved in such business, and all the accessories connected therewith, including the interest of such company, owner or operator in the real estate used in carrying on such business. [The amendment of March 23, 1894, inserted "mine" in first line.]"

The grounds of attack upon the order are (1) that the statute invoked is unconstitutional and in conflict with the bankruptcy act; (2) that the statute does not relate to manufacturing establishments other than those similar to rolling mills and foundries; and (3) that the bankrupt did not own or operate a manufacturing establishment.

1. The asserted ground of unconstitutionality is that the statute unreasonably discriminates in favor of those who furnish materials and supplies to manufacturing establishments, as against those furnishing money or machinery to the same establishments, as well as those furnishing materials and supplies to establishments not engaged in manufacturing; and discriminates against manufacturing establishments in favor of other establishments. We think this contention without merit.

The rule is well settled that the equal protection clause of the 14th Amendment does not take from the states the power to classify the subjects of legislation, but leaves to the legislatures a wide field of discretion in that regard, avoiding such classification only when unreasonable and arbitrary; and that a legislative classification is presumed to be reasonable unless it is apparent that there was and could be no reasonable basis therefor. Lindsley v. Natural Carbonic Gas Co., 220 U. S., 61, 73-78, and cases there cited; The Jeffrey Mfg. Co. v. Blagg, 235 U. S. 571, 577. We see nothing arbitrary or unreasonable in preferring material men, whose supplies enter into the marketed product, over sellers of machinery, upon which liens for the purchase price may well be reserved, or over those loaning money, who not infrequently are in position to exact personal security or endorsement; nor in either of the other respects complained of. We cite in the margin several decisions of the Supreme Court which we think amply sustain the validity of this statute against the criticisms urged[2]. The statute in no way conflicts with the bankruptcy act. Section 64*b* of the act provides that "the debts to have priority, except as herein provided, and to be paid in full out of bankrupt estates, and the order of payment shall be * * * (5) * * * debts owing to any person who by the laws of the States or the United States is entitled to priority." It was expressly held by this court in the Bennett case that this section of the bankruptcy act adopts the Kentucky statute in question, and makes it the applicable federal law in determining priorities (153 Fed. at p. 674).

2. The proposition that the statute relates to manufacturing establishments only of the class of rolling mills and foundries invokes the doctrine of ejusdem generis. We think this question should be regarded as foreclosed against appellant's contention by

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[2] Tullis v. Lake Erie & Western R. R. Co., 175 U. S. 348; Minnesota Iron Co. v. Kline, 199 U. S. 593; Louisville & Nashville Ry. Co. v. Melton, 218 U. S. 36; Aluminum Co. v. Ramsey, 222 U. S. 251; Barrett v. Indiana, 229 U. S. 26; Singer Sewing Mach. Co. v. Brickell, 233 U. S. 304; Easterling Lumber Co. v. Pierce, 235 U. S. 380.

the repeated decisions of the Court of Appeals of Kentucky and of this court, extending over a period of several years. In Winter v. Howell's Assignee (1900) 109 Ky. 163, the statute was applied to the case of one whose business was the sale of mixed paints and the manufacture of a cut-off for a cistern. In Graham v. Mcgann Fawke Lumber Co., 118 Ky. 367, and in Bogard v. Tyler, 119 Ky. 637, it was held that a saw mill was a manufacturing establishment within the meaning of this statute. In Hall & Son v. Guthrie's Sons, 103 S. W. Rep. 721, a flouring mill was held to be a manufacturing establishment within the same statute. In the case of In re Bennett, 153 Fed. 673, the priority provided by the statute was applied by this court in the case of a manufacturer of barrels in favor of the seller of heading and staves; and In re Starks-Ullman Saddlery Co., (1909) 171 Fed. 834, the statute was held by this court to apply to the manufacture of harnesses, bridles and other horse leather-goods. True, in the Bennett case the application of the statute was not directly discussed; but in the later case of Starks-Ullman Saddlery Co. it was said of the claims involved in the Bennett case that they "were indisputably for materials and supplies furnished for the 'carrying on' of an indisputable manufacturing business". (171 Fed. at p. 835.) It is true that in none of the cases cited was the doctrine of ejusdem generis referred to; but that rule is merely an aid in determining legislative intent; and each of the decisions referred to necessarily involved the finding of legislative intent as including the establishments held respectively to be included within the "manufacturing establishments" of the statute, and so is necessarily inconsistent with the construction here urged. That the reason here assigned for finding a different legislative intent was not mentioned in the opinions referred to would not, in view of the language and history of the statute, justify us in reaching a different conclusion. The fact that since the disposition of this case below the legislature of Kentucky has amended the statute by the omission of manufacturing establishments does not, in our opinion, affect the question of legislative intent in the passage of this act 30 years or more previous to such amendment.

3. The remaining question, viz: whether the bankrupt's business was that of manufacturing, presents greater difficulties. The subject was elaborately discussed below by Judge Cochran, in an opinion reported, 207 Fed. 119.

The purpose of the bankrupt's business, as stated in its articles of incorporation, is "buying, selling, dealing, preserving and packing fruits, vegetables, fruit products and similar articles, in the State of Ohio and elsewhere". Its actual business was confined to putting up and selling what are popularly known on the market as "Maraschino Cherries", but which were not actually such. According to the record here, the real Maraschino cherry is grown in Dalmatia, Austria.[1] The cherries used by the bankrupt were large, white-

[1]According to the Century Dictionary, "Marasca" is the name of the cherry; "Maraschino" that of the cordial distilled therefrom or flavored therewith. The difference, however, is immaterial to the reasoning or the conclusion of this opinion.

meated, free-stone cherries, grown in Greece or Italy; they were packed with the stems on, bleached by a sulphuring process, and finally placed in casks, where they were immersed in a solution of brine and sulphurous acid, to prevent fermentation and spoiling while in transit. The treatment up to this point was done by the foreign grower. The bankrupt purchased the cherries in the condition stated. At the bankrupt's establishment the casks were emptied, the cherries washed in various changes of water to effectually remove the brine and acid; they were then stemmed by hand, then pitted by machinery, then washed again in various changes of water to remove any trace of brine or acid which might have penetrated the meat of the cherry. The washings consumed about 24 hours, their object being to restore the cherries as nearly as possible to their condition before packing in the brine and acid solution. The cherries were then colored either red or green by immersion in a coloring solution, then sweetened by immersion in a syrup of cane sugar and water contained in vacuum kettles, where they were kept hot for 12 hours, and boiled for from 24 to 48 hours; they were then flavored by adding to the syrup the desired flavoring substance, were then sorted and graded, and then put into bottles or other containers, which were labeled and shipped by the bankrupt to its customers. The entire treatment in the bankrupt's establishment took six days. A part of the product was flavored with true "Maraschino" water made from real Dalmatian cherries; another part was flavored with Marasque water made from cherries grown in Southern France, and being an imitation of the real Maraschino water. The red ones were large and luscious, and until 1911 had been labeled "Maraschino Cherries", by which name they were popularly known. Since the taking effect of the pure food and drug act in 1911 they were labeled simply as cherries, artificially colored and if flavored with real Maraschino water that fact was stated. This change in labeling has not affected their sale, nor presumably to any extent the name by which they are popularly known. The chief, if not the only use to which these so-called Maraschino Cherries are put is as a garnish in various mixtures of alcoholic liquors, in salads, ice-cream and desserts. Their flavor is not that of the original cherry, nor even that of the real "Maraschino" (or Marasca) cherry.

The specific question is whether the putting up and marketing of these cherries, including their preservation, coloring and flavoring so as to produce the articles of commerce known as Maraschino cherries, specially adapted to the use stated, is, properly speaking, manufacture within the Kentucky statute.

At the threshold we are met with the proposition that manufacturing necessarily implies transformation, the emerging of a new and different article, bearing a distinct name, character or use. This general proposition has in numerous cases been declared and applied to the facts and under the conditions involved therein. Appellant insist that it follows from these decisions that the lien here in question must be denied, for the cherries went into the bankrupt's establishment as cherries and came out as cherries, the separate idea

tity of each cherry being retained. We refer to the more important of these decisions.

In Frazee v. Moffit, 18 Fed. 584, Judge Blatchford, then on the circuit bench, held that baled hay was not manufactured within the section of the statute providing for a duty "on all articles manufactured in whole or in part, not herein enumerated or provided for", notwithstanding in the process of making hay the starch and gluten contained in the grass was converted into sugar; saying (p. 587)— "The substance of dried grass or hay is still grass. Change of name and manipulation do not necessarily constitute manufacture, within the meaning of section 2516".

In Hartranft v. Wiegman, 121 U. S. 609, it was held in an opinion by Judge (then Mr. Justice) Blatchford, that shells cleaned by acid and then ground on a metal wheel, some of them afterward etched by acid, and all intended to be sold for ornaments as shells, were not dutiable as "manufactures of shells" under the tariff act then in force, but were exempt from duty as "shells of every description, not manufactured". In the course of the opinion it was said of the shells in question, "They were still shells. They had not been manufactured into a new and different article, having a distinctive name, character or use from that of a shell".

In Anheuser-Busch Brewing Assn. v. United States, 207 U. S. 566, it was held, in an opinion by Mr. Justice McKenna, that the treatment of corks by a manufacturer and exporter of beer, by way of sterilizing them and closing the seams, holes and crevices so as to adapt them for export use, did not entitle the manufacturer to the drawback allowed by the tariff act on imported raw material used in the manufacture or production of articles in the United States; it being held that such treatment of the corks was merely incidental to the preparation and bottling of beer for market. It was there said that something more than "treatment, labor and manipulation" are necessary to "manufacture". "There must be a transformation; a new and different article must emerge, 'having a distinctive name, character or use'. This cannot be said of the corks in question. A cork put through the claimant's process is still a cork. The process is the preparation of the encasement of the beer" etc.

There is also a group of cases involving statutory exemptions from taxation or license charges, some of which are relied upon by appellants. In City of New Orleans v. Mannessier, 32 La. Ann. 1075, it was held that an ice-cream confectioner is not a manufacturer in the sense of the law which exempts the latter from taxation. The case involved liability for a license on the business of peddling ice-cream on the streets. The exemption was claimed by virtue of a statute prohibiting municipal corporations from levying taxes on "persons engaged in selling articles of their own manufacture, manufactured in this state". The court said: "The attempt to magnify a confectionery, which is defendant's business, into a manufacture, must fail".

In City v. Coffee Co., 46 La. Ann. 86, it was held that a corporation which by careful and cleanly roasting and a secret process of cooling produced "brands" of unground roasted coffees, each of

which was claimed to have a recognizable taste, was not a "manufacturer" within the meaning of the exemption provision of the constitution. A somewhat similar holding was had in People v. Roberts, 145 N. Y., 375, as applied to the business of mixing tea, roasting and grinding coffee and packaging spices and baking powders.

In People v. Knickerbocker Ice Co., 99 N. Y., 181, and Hittinger v. Westford, 135 Mass., 258, it was held that the cutting, storage, preserving and selling of natural ice was not manufacture. Doubtless a different rule would be applied to the making of artificial ice. (Atty. Gen. v. Lorman, 59 Mich., 157.)

In People v. Roberts, 155 N. Y., 408, it was held that a corporation engaged in the business of slaughtering sheep and lambs, refrigerating and shipping meat, selling the hides and wool therefrom and converting the offal into fertilizer, was not "carrying on manufacture" within the exemption statute. (A contrary conclusion was reached by the Supreme Court of Ohio, in Engle v. Sohn, 41 O. St., 691, and persons engaged in the slaughtering and packing of pork and the rendering of lard have been held to be manufacturers under the internal Revenue Act. See 9 Int. Rev. Record 193.)

In Standard Tailoring Co. v. City of Louisville, 152 Ky., 504, a tailoring company, which distributed samples of cloth among local dealers who had prospective purchasers select the goods, the selection being sent to the company together with the purchaser's measurements or figure, whereupon clothing was manufactured and sold to the merchant to be resold by him, was held not to be a manufacturing establishment within the meaning of a city ordinance passed to induce the location of "more manufacturing establishments within the city", and so exempting such establishments from taxation for a term of years.

In City of Memphis v. St. L. & S. F. R. Co., 183 Fed., 529, 538, this court held that a cotton compress was not a "manufacturing plant" withing the meaning of a statute authorizing a railroad company to build lateral roads not exceeding a certain length "to any mill, quarry, mine, manufacturing plant", etc.

Whatever conclusion the cases cited may lead to in the disposition of the instant case, each of them is distinguishable from the case before us. Of the tariff cases generally, it may be said that the question of classification is usually more or less technical, frequently depending upon comparison of different schedules. The Hay case (Frazee v. Moffit) and the Sheel case (Hartranft v. Weigman) must be read in the light of the well-settled rule that doubts are resolved in favor of the importer, because "duties are never imposed on the citizens upon vague or doubtful interpretations" (Hartranft v. Weigman, supra, at p. 616).

Frazee v. Moffit, (the hay case) was cited with approval by the Supreme Court in Hartranft v. Weigman and Brewing Assn. v. United States, and by this court in Memphis v. Railroad Co., supra; and has been similarly cited by other courts. But as respects the case itself, it may be open to doubt whether its doctrine would be applied to one whose sole business affirmatively appeared to be the

tting, curing and baling of hay for the market, as distinguished om hay which may have been and usually is made as incident to e general business of farming. As to the corks, in Brewing Assn. United States, they were merely cleansed and coated as an incident preparing beer for export; such treatment, while improving the rks, gave them no "distinctive name, character or use".

The cases involving exemption from taxation are, as a class, subject the rule thus tersely stated in Jones Bros. v. City of Louisvile, 142 v., 759; "The right of taxation is never presumed to be relinished, and before any party can rightfully claim an exemption om the common burden, it is encumbent on the party to show irmatively that the exemption claimed is authorized by law. If ere be a doubt upon the subject, that doubt must be resolved in vor of the state, and it is only where the exemption is shown to be anted in terms clear and unequivocal that the right of exemption n be maintained."

There is nothing in the coffee, tea and ice cases (46 La. Ann., 86; 5 N. Y., 375; 99 N. Y., 181; and 135 Mass., 258) at all inconsist with the classification of the industry here in question as a nufacture. The ice-cream case (32 La. Ann., 1075) was cited in Standard Tailoring Company case, but here again it is at least rly open to question whether that ruling would be applied to one ose sole business was the manufacture and vending at wholesale ice-cream. This doubt is strengthened by the later decisions of Supreme Court of Louisiana in City v. Ernst & Co., 35 La. Ann., 3; State v. Eckendorf, 46 La. Ann., 141; and State v. American gar Refining Co., 108 La. Rep., 603. The cotton compress case 3 Fed., 529) has in itself little, if any, pertinency here, as comssing cotton is merely packing it; and the construction of the inance there in question is clearly subject to the rule that munial grants of franchises or privileges in which the public are erested are to be construed strictly in favor of the public, and that hing passes by implication which is not granted in clear and exit terms. Knoxville Water Co. v. Knoxville, 200 U. S., 22, 24; ir v. Chicago, 201 U. S., 401; Cleveland Elec. Ry. Co. v. Cleved, 204 U. S., 116, 120. Indeed, the making of sheets of "batting" m cotton has been held manufacturing under the Internal Reve laws (5 Int. Rev. Record 180).

On the other hand, statutes of the nature of the Kentucky lien before us belong to the general class of remedial statutes; and le the courts were at one time inclined to hold that such statutes, ng in derogation of the common law, must always be strictly conued, there has been a noticeable relaxation in favor of a more ral construction, for the purpose of effecting the beneficent purs of such legislation. The federal safety appliance act is, in this v, liberally construed. Johnson v. So. Pac. R. R. Co., 196 U. S., 17; Schlemmer v. Buffalo, etc., Rv. Co., 205 U. S., 1; Southern So. v. Snyder (C. C. A. 6) 187 Fed., 492, 495. State statutes nting exemption of property from liability for debt have been rally enforced in bankruptcy administration,—In re National cer Co., (C. C. A. 6) 181 Fed., 33,—and a state statute granting

the widow and children support from the estate of the deceased for a definite period has been held applicable when bankruptcy occurs before death. Hull v. Dicks, 235 U. S., 584. The Michigan Statute giving a lien for labor upon logs has been held entitled to a liberal construction to effectuate the object of providing additional security to the laborer. Shaw v. Bradley, 59 Mich., 199, 209. So, in respect to statutes giving liens to mechanics and materialmen, there is a pronounced tendency toward liberality of construction.

It is "a sound rule of construction, that a statute giving a lien is regarded as a remedial statute and is to be liberally construed so as to give full effect to the remedy, in view of the beneficial purpose contemplated by it" (1 Jones on Liens, Sec. 1005). See also Smalley v. Terra Cotta Co., 113 Mich., 141, 146; De Witt v. Smith, 63 Mo., 263; Maynard v. Ivey, 21 Nev., 241; Bullock v. Horn, 44 O. St., 420; Godfrey Lumber Co. v. Kline, 167 Mich., 629, 632. And although no one is to be included "by strained construction" (Thompson v. Baxter, 92 Tenn., 305), and "the courts cannot extend a statute to meet cases for which the statute does not provide, though those cases may be of equal merit with those provided for" (1 Jones on Liens, Sec. 105); and although there are cases (such as May, etc., Brick Co. v. Engineering Co., 180 Fed., 535) still holding to the theory of strict construction, as well as others making the distinction that "upon the question whether a lien attaches at all, a strict construction is proper" (2 Jones on Liens, Sec. 1554; Lacy v. Power & Heat Co., 157 Mich., 544, 546), as distinguished from the liberal construction to be applied after the lien has once attached; yet the generally prevailing rule falls short, we think, of the very strict rule pertaining to the construction of tariff and tax exemption statutes.

Apart, however, from any question of liberal construction of lien statutes generally, we think it entirely safe to say that the tendency of modern decision has been to appreciably expand the formerly prevailing definition of "manufacture". In Tidewater Oil Co. v. United States, 171 U. S., 210, 216, Mr. Justice Brown, in applying the term "manufacture" in a tariff drawback case, said that the word "is now ordinarily used to denote an article upon the material of which labor has been expended to make the finished product". In Friday v. Hall & Co., 216 U. S., 449, 454, Mr. Justice Lurton spoke of this definition as an "expansion of the meaning of the word 'manufacture' "; and in that case this expanded definition was applied to the term "manufacturing" as used in the fourth section of the Bankruptcy Act, Mr. Justice Lurton saying, "Undoubtedly, Congress intended that that class of business corporations engaged in any class of manufacturing as its principal business, *and not as a mere minor incident to some larger work*,[1] should be subject to the law; and this intention should be regarded by giving to doubtful words and terms a liberal rather than a narrow meaning. 'Manufacturing' has no technical meaning. It is not limited by the means used in making, nor by the kind of product produced. In Kidd v. Pearson, 128 U. S., 1, 20, Mr. Justice Field said that 'manu-

[1]Italics ours.

facture is transformation, the finishing of raw material into a change of form or use'." And in the Friday case this expanded definition of manufacture was held to cover a corporation organized to construct railroads, buildings and other structures, including arches, walls and bridges from concrete, although the materials used in making were combined and the labor, machinery and materials supplied at the place of construction called for by the contract. And this court, in Columbia Iron Works vs. National Lead Co., 127 Fed., 99, held that a corporation engaged principally in the business of building and repairing large steel ships for sale and upon order was engaged in manufacturing. This case was cited with approval in the Friday case. The business of the bankrupt here was clearly manufacturing within section 4 of the bankruptcy act.

We find nothing in the Kentucky decisions supporting the limited construction of "manufacturing" contended for by appellants. It is true that in Bogard v. Tyler, 119 Ky., 637, in which a saw mill was held to be a manufacturing establishment, it was said that "the lien being statutory, all the conditions upon which it is predicated must exist"; but this statement suggests no unusual strictness of construction. Again: Muir v. Samuels, 110 Ky., 605, holds that a laundry is not a manufacturing establishment within the meaning of the lien statute involved here. It was there aptly said that "the only business of a laundry is to transform soiled into clean linen". In the Tailoring Company case, where Jones v. Louisville and other cases asserting the strictness of construction to be applied to tax exemption statutes are cited and quoted from at length, it was said (p. 105) that "the words 'manufacturing establishment' have been given a variety of meanings, depending largely on the circumstances surrounding the case in which they have been used. The result of this is that although the words have been often defined by the courts, few judicial precedents can be found that may be properly applied to any particular state of facts"; and after stating the dictionary definition of the term, the court goes on to say (p. 506) that in applying that definition "to the facts of particular cases in which the construction of statutes or ordinances were involved, the courts, especially in license and exemption cases, have found it necessary in carrying out the legislative intent in the use of the word [manufacture] to materially limit the scope" of the general definition, and that "indeed we might say that the meaning of the words 'manufacture' and 'manufacturing establishment' has been adapted to meet the varying circumstances arising in the case or classes of cases in which it was necessary to define them, so that the intent with which they were used might be accomplished. The purpose of the law-making body in using the words has always been allowed to have controlling weight in the decision of the meaning that should be attached to them", etc. In denying the exemption there claimed, the court seems to have been strongly impressed with the consequences which would result from allowing the exemption, as resulting in the inclusion of all merchant tailors, milliners, dress makers, bakers, confectioners, shoemakers, carpenters, cabinetmakers "and all other

persons who are engaged in converting articles from one form into another".

In common parlance, the bankrupt's establishment would ordinarily be called a factory. Canning factories and pickle factories are well known in common speech. Considering the purpose of the statute, we think it more natural to conclude that the legislature used the term "manufacturing establishment" in its ordinary sense, rather than in its technical meaning, as used in relations to which the object of the statute is entirely foreign, viz: tariff cases and tax exemptions.

Certain dicta are cited as leading to a contrary conclusion; thus, Frazee v. Moffitt contains the dictum that "dried apples would not be called a manufactured article, though the apple is peeled and cored and sliced and dried by exposure to the sun and manipulation"; but assuming that this is true of domestic apple drying as conducted thirty years ago, it by no means follows that the same rule would apply to the large factories where fruit is evaporated and bleached for the market; nor to the large canning factories of the present day which play so important a part in the industrial art. In Schlitz Brewing Co. v. United States, 181 U. S., 584, where it was held that the fact that the beer must be steamed after bottling "does not convert a bottle from an encasement into an ingredient", reference was made, by way of illustration, to "certain canned fruits and vegetables which are required to be encased while hot and still in the process of preservation". But we fail to find in this even a dictum that a canning establishment does not "manufacture". On the other hand, there are not wanting dicta expressly recognizing canning factories as manufacturing establishments. See Engle v. Sohn, supra.; State v. American Sugar Ref. Co., 108 La. Rep., 603, 628; In re Alaska American Fish Co., 162 Fed., 498. In the Engle Case (which involved exemption from taxation) "canned fruits" were included in the illustrative category of articles which "though but slightly changed from the original material, could not, we think, be properly classified as unmanufactured goods". In the Sugar Refining Case, which held that a sugar refinery is a manufactory and is exempt from license taxation, it was said that the "canning factories, which prepare fruits and vegetables for future use without changing the identity of the raw material, are manufactories by the very term used to designate them"; in the Fish Company case, a company operating a plant for preparing, preserving and packing fish, was directly held to be principally engaged in manufacturing within the meaning of the Bankruptcy Act.

The actual business of the bankrupt here was more than mere canning or preserving and more than mere cooking or coloring; whether the bankrupt was manufacturing "must turn more upon what it was actually doing than upon what it was authorized to do" (Friday v. Hall, supra., p. 454). Having in mind the change which the bankrupt's process created with respect to distinctive name, character and use, we are constrained to the view that its establishment which put up the so-called Maraschino Cherries was a manufacturing establishment within the Kentucky lien law.

It results from these views that the order complained of should be affirmed with costs.

Petition for Appeal.

(Filed April 27, 1915.)

United States Circuit Court of Appeals for the Sixth Circuit.

#2539.

In the Matter of THE I. RHEINSTROM & SONS COMPANY, Bankrupt.

CENTRAL TRUST COMPANY OF ILLINOIS and COVINGTON SAVINGS BANK & TRUST CO., as Trustee in Bankruptcy, Appellants,
vs.
GEORGE LUEDERS & Co. et al., Appellees.

To the Honorable Loyal E. Knappen, Arthur C. Denison and John E. Sater, Circuit Judges of the U. S. Circuit Court of Appeals for the Sixth Circuit:

Central Trust Company of Illinois, and Covington Savings Bank & Trust Company, as Trustee of The I. Rheinstrom & Sons Company, bankrupt, conceiving themselves aggrieved by the final order and decree entered in the above entitled proceeding on the 2nd day of March, 1915, confirming the order and decree of the Hon. A. M. J. Cochran, District Judge of the United States, for the Eastern District of Kentucky, allowing the claims of certain lien claimants and others similarly situated, for liens, under Sections 2486 and 2491 of the Kentucky Statutes, this cause being one in which the U. S. Circuit Court of Appeals for the Sixth Circuit has not final jurisdiction, and it being a proper cause to be reviewed by the Supreme Court of the United States on appeal, do hereby pray an appeal from the said order and decree, to the Supreme Court of the United States, for the reasons specified in the Assignment of Errors filed herewith; and pray that this appeal may be allowed, and that a citation may issue directed to the said lien claimants; and that a transcript of the record proceedings and evidence upon which said order is based, duly authenticated, may be sent to the Supreme Court of the United States; and further pray that this appeal may operate as a supersedeas upon the filing of the required bond, and that the amount of such bond be fixed by the Honorable Court.

ROSENTHAL & HAMILL,
Attorneys for Central Trust Co. of Illinois,
1400 *Ft. Dearborn Bldg., Chicago, Ill.*
HARMON, COLSTON, GOLDSMITH & HOADLY,
Attorneys for Covington Savings Bank & Trust Co., as Trustee, St. Paul Bldg., Cincinnati, Ohio.

Endorsement: No. 2539. U. S. Circuit Court of Appeals for the Sixth Circuit. Central Trust Company of Illinois, and Covington Savings Bank & Trust Co., as Trustee in Bankruptcy, Appellants, vs. George Lueders & Co. et al., Appellees. Petition for Appeal. Lodged with me this 26th day of April, 1915. Loyal E. Knappen, Circuit Judge. Filed Apr. 27, 1915. Frank O. Loveland, Clerk.

Assignment of Errors.

(Filed Apr. 27, 1915.)

United States Circuit Court of Appeals for the Sixth Circuit.

#2539.

CENTRAL TRUST COMPANY OF ILLINOIS and COVINGTON SAVINGS BANK & TRUST CO., as Trustee in Bankruptcy, Appellants,

vs.

GEORGE LUEDERS & CO. et al., Appellees.

And now come the appellants, Central Trust Company of Illinois, by Rosenthal and Hamill, its attorneys, and the Covington Savings Bank & Trust Company, as trustee of the estate of The I. Rheinstrom & Sons Company, Bankrupts, by Harmon, Colston, Goldsmith & Hoadly, its attorneys, and say that in the record and proceedings herein, there is manifest error, and that they feel themselves to be aggrieved by the judgment and decree herein, and that the United States Circuit Court of Appeals for the Sixth Circuit erred in this, to-wit:

First: In holding and deciding that Section 2487 of the Kentucky Statutes is constitutional, the said statute providing:

"Lien of employes and material men on property assigned for the benefit of creditors. When the property or effects of any (mine) railroad, turnpike, canal or other public improvement company, or or any owner or operator of any rolling mill, foundry or other manufacturing establishment, whether incorporated or not, shall be assigned for the benefit of creditors, shall come into the hands of any executor, administrator, commissioner, receiver of a court, trustee or assignee for the benefit of creditors, or shall in any wise come to be distributed among creditors, whether by operation of law or by the act of such company, owner or operator, the employes of such company, owner or operator in such business, and the person who shall have furnished materials or supplies for the carrying on of such business, shall have a lien upon so much of such property and effects as may have been involved in such business, and all the accessories connected herewith, including the interest of such company, owner or operator in the real estate used in carrying on such business. (The amendment of March 23, 1894, inserted "mine" in first line.)"

Second: In holding and deciding that the said Kentucky Statute

is not in conflict with nor void under the Fourteenth Amendment to the Constitution of the United States.

Third: In holding and deciding that the said Kentucky Statute does not deprive the appellant, Central Trust Company of Illinois, and other general unsecured creditors of the bankrupt, of their property, without due process of law, nor deny to the appellant or any of said creditors the equal protection of the laws, under the Fourteenth Amendment to the Constitution of the United States.

Fourth: In holding and deciding that the said Kentucky Statute does not unreasonably discriminate in favor of those who furnished materials and supplies to the bankrupt as against said Central Trust Company of Illinois which furnished money to said bankrupt or as against other general unsecured creditors who furnished money, machinery or goods and merchandise other than materials and supplies, to said bankrupt.

Fifth: In holding and deciding that the said Kentucky Statute does not unreasonably discriminate in favor of persons who furnished materials and supplies to manufacturing establishments as against persons who furnished such materials and supplies to establishments not engaged in manufacturing.

Sixth: In holding and deciding that the said Kentucky Statute does not unreasonably discriminate against manufacturing establishments in favor of other establishments.

Seventh: In holding and deciding that the said Kentucky Statute applies to all manufacturing establishments instead of holding and deciding that it applies only to those manufacturing establishments of the same class as a rolling mill and foundry, which are specifically enumerated in the Statute, and in holding and deciding that, therefore, the bankrupt's establishment was a manufacturing establishment within the meaning of said Kentucky Statute, instead of holding and deciding that the bankrupt's establishment was not such a manufacturing establishment.

Eighth: In holding and deciding that the bankrupt maintained a manufacturing establishment and that, therefore, said Kentucky Statute was applicable, instead of holding and deciding that the bankrupt did not maintain any manufacturing establishment and that, therefore, said Kentucky Statute was not applicable.

Ninth: In holding and deciding that the said Kentucky Statute is not contrary to nor in conflict with the Act of July 1, 1898, generally referred to as the United States Bankruptcy Act, and entitled, "An Act to establish a uniform system of bankruptcy throughout the United States", and the several amendments thereto.

Tenth: In holding and deciding that the appellees and all other creditors who had filed claims for liens under and by virtue of said Kentucky Statute, were entitled to such liens and to preference and priority over the appellant, Central Trust Company of Illinois, and other general unsecured creditors of the bankrupt.

Eleventh: In holding and deciding that all debts for materials and supplies furnished the bankrupt for the carrying on of its business are liens upon so much of the property and effects of the bankrupt as may have been involved in said business and all the

accessories connected therewith, including the interest of the bankrupt in the real estate used in carrying on such business.

Wherefore, said appellants pray that the errors assigned be examined and corrected, and that the judgment and decree of the United States Circuit Court of Appeals for the Sixth Circuit, entered herein, be reversed.

CENTRAL TRUST COMPANY OF ILLINOIS,
By ROSENTHAL & HAMILL, *Its Attorneys.*
COVINGTON SAVINGS BANK & TRUST CO., *As Trustee as Aforesaid,*
By HARMON, COLSTON, GOLDSMITH & HOADLY, *Its Attorneys.*

Endorsement: No. 2539. U. S. Circuit Court of Appeals for the Sixth Circuit. Central Trust Company of Illinois, and Covington Savings Bank & Trust Co., as Trustee in Bankruptcy, Appellants, vs. George Lueders & Co., et al., Appellees. Assignment of Errors. Lodged with me this 26th day of April, 1915. Loyal E. Knappen, Circuit Judge. Filed Apr. 27, 1915. Frank O. Loveland, Clerk.

Order Allowing Appeal.

(Filed Apr. 27, 1915.)

United States Circuit Court of Appeals for the Sixth Circuit.

#2539.

In the Matter of THE I. RHEINSTROM & SONS COMPANY, Bankrupt.

CENTRAL TRUST COMPANY OF ILLINOIS and COVINGTON SAVINGS BANK & TRUST CO., as Trustee in Bankruptcy, Appellants,
vs.
GEORGE LUEDERS & Co. et al., Appellees.

Now come Central Trust Company of Illinois, and Covington Savings Bank & Trust Co., as Trustee, by their respective attorneys, and present their Assignment of Errors and Petition for Appeal from the order entered herein on the 2nd day of March, 1915, to the Supreme Court of the United States, whereupon the court, being fully advised in the premises, does now, towit, on the twenty-sixth day of April, 1915, order that the appeal be allowed as prayed for; and it is further ordered that this appeal shall operate as a supersedeas upon filing of the required bond, which bond, hereby fixed at the sum of Five Hundred Dollars ($500), is now presented and hereby approved.

LOYAL E. KNAPPEN,
Circuit Judge.

Endorsement: No. 2539. U. S. Circuit Court of Appeals for the Sixth Circuit. Central Trust Company of Illinois, and Covington Savings Bank & Trust Co., as Trustee in Bankruptcy, Appellants, vs. George Lueders & Co. et al., Appellees. Order allowing Appeal. Lodged with me this 26th day of April, 1915. Loyal E. Knappen, Circuit Judge. Filed Apr. 27, 1915. Frank O. Loveland, Clerk.

Bond on Appeal to the Supreme Court of the United States.

(Filed Apr. 27, 1915.)

Know all men by these presents, That we, Central Trust Company of Illinois, and Covington Savings Bank & Trust Company, as Trustee, of the Estate of I. Rheinstrom & Sons Company, bankrupt, as principals and United States Fidelity & Guaranty Company as surety, are held and firmly bound unto George Lueders & Co., G. S. Nicholas & Co., D. A. White Co., The E. Berghausen Chemical Co., The E. A. Conkling Box Co., T. A. Decker, B. F. Goodrich Co., and Hazen-Atlas Glass Co., in the full and just sum of Five Hundred ($500.00) dollars, to be paid to the said George Lueders & Co., G. S. Nicholas & Co., D. A. White Co., The E. Berghausen Chemical Co., The E. A. Conkling Box Co., T. A. Decker, B. F. Goodrich Co., and Hazen-Atlas Glass Co., certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 24th day of April, in the year of our Lord one thousand nine hundred and fifteen.

Whereas, lately at a Circuit Court of Appeals of the United States, for the Sixth Judicial Circuit, in a suit depending in said Court, between Central Trust Company of Illinois, and Covington Savings Bank & Trust Company, as Trustee, etc., and George Lueders & Co., et al., a decree was rendered against the said Central Trust Company of Illinois and Covington Savings Bank & Trust Company, as Trustee, etc., and the said Central Trust Company of Illinois, and Covington Savings Bank & Trust Company, as Trustee, etc., having obtained an appeal and filed a copy thereof in the Clerk's Office of the said Court to reverse the decree in the aforesaid suit, and a citation directed to the said George Lueders & Co., et al., (above named) citing and admonishing them to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date thereof.

Now, the condition of the above obligation is such, That if the said Central Trust Company of Illinois, and Covington Savings Bank & Trust Company, as Trustee, etc., shall prosecute said appeal to effect, and answer all damages and costs if they fail to make

their plea good, then the above obligation to be void; else to remain in full force and virtue.

CENTRAL TRUST COMPANY OF ILLINOIS,
By ROSENTHAL & HAMILL,
Its Attorneys. [SEAL.]
COVINGTON SAVINGS BANK & TRUST COMPANY,
By HARMON, COLSTON, GOLDSMITH & HOADLY, *Its Attorneys.* [SEAL.]
UNITED STATES FIDELITY AND GUARANTY COMPANY,
By HARRY B. HUPP, *Attorney-in-Fact.*

Sealed and delivered in the presence of—
J. A. HAMELRATH.

Approved by—
LOYAL E. KNAPPEN,
U. S. Circuit Judge.

Endorsement: No. 2539. United States Circuit Court of Appeals, Sixth Circuit. Central Trust Co. of Illinois, et al., vs. George Lueders & Co., et al. Bond on Appeal to Supreme Court of the United States. Lodged with me this 26th day of April, 1915. Loyal E. Knappen, Circuit Judge. Filed Apr. 27, 1915. Frank O. Loveland, Clerk.

United States Circuit Court of Appeals for the Sixth Circuit.

I, Frank O. Loveland, Clerk of the United States Circuit Court of Appeals for the Sixth Circuit, do hereby certify that the foregoing is a true and correct copy of the record, and of the assignment of errors and of all proceedings in the case of Central Trust Company of Illinois, et al., vs. George Lueders & Co., et al., No. 2539, as the same remains upon the files and records of said United States Circuit Court of Appeals for the Sixth Circuit, and of the whole thereof.

In testimony whereof, I have hereunto subscribed my name, and affixed the seal of said Court, at the City of Cincinnati, Ohio, this 27th day of April, A. D. 1915.

[Seal United States Circuit Court of Appeals, Sixth Circuit.]

FRANK O. LOVELAND,
Clerk of the United States Circuit Court of Appeals for the Sixth Circuit,
By ARTHUR B. MUSSMAN, *Deputy,*
Acting Pursuant to Sec. 125 *Judicial Code, After the Death of the Clerk.*

UNITED STATES OF AMERICA, *ss:*

To George Lueders & Co., G. S. Nicholas & Co., D. A. White Co., The E. Berghausen Chemical Co., The E. A. Conkling Box Co., T. A. Decker, B. F. Goodrich Co., and Hazel-Atlas Glass Co., Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to an appeal, filed in the Clerk's Office of the United States Circuit Court of Appeals for the Sixth Judicial Circuit, wherein Central Trust Company of Illinois, and Covington Savings Bank & Trust Company, as Trustee of the Estate of I. Rheinstrom & Sons Company, bankrupts, are appellants, and you are appellees, to show cause, if any there be, why the decree rendered against the said appellants as in the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness my hand this twenty-sixth day of April, in the year of our Lord one thousand nine hundred and fifteen (1915).

LOYAL E. KNAPPEN,
Judge of the U. S. Court of Appeals for the Sixth Circuit.

Service of the within citation is hereby waived and appearance of the appellees entered herein.

DE CAMP & SUTPHIN,
Attorneys for Appellees, Geo. Lueders & Co., and G. S. Nicholas & Co.

BURCH, PETERS & CONNOLLY,
Attorneys for Appellees, D. A. White Company, The E. Berghausen Chemical Company, The E. A. Conkling Box Company, T. A. Decker, B. F. Goodrich Company, Hazel-Atlas Glass Company.

April 28, 1915.

Endorsed on cover: File No. 24,693. U. S. Circuit Court Appeals, 6th Circuit. Term No. 949. Central Trust Company of Illinois and Covington Savings Bank & Trust Company, as trustee of The I. Rheinstrom & Sons Company, bankrupt, appellants, vs. George Lueders & Co. et al. Filed April 29th, 1915. File No. 24,693.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1914.

No. 945 445

CENTRAL TRUST COMPANY OF ILLINOIS
AND
COVINGTON SAVINGS BANK & TRUST CO.,
AS TRUSTEE IN BANKRUPTCY,
Petitioners,

vs.

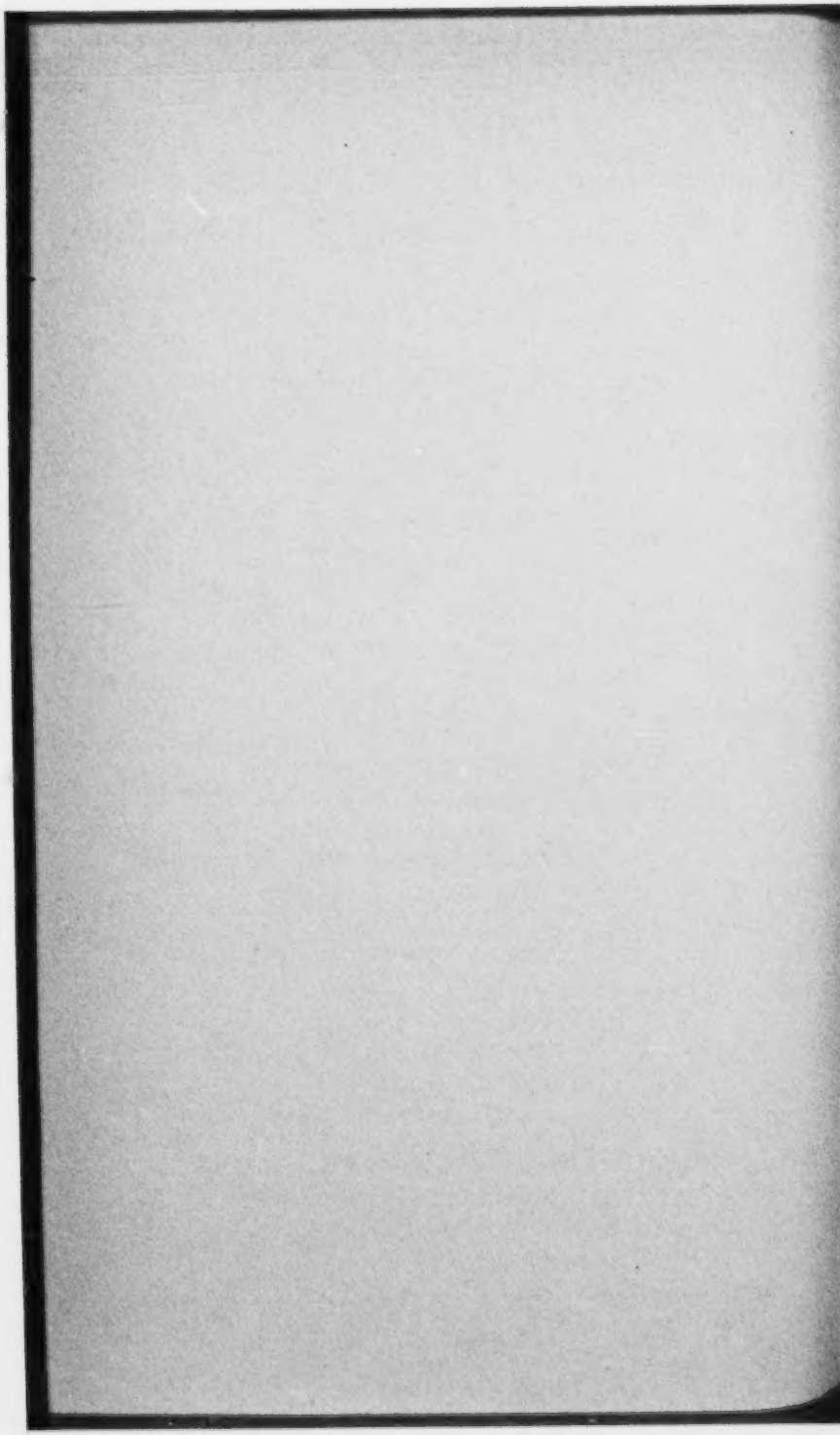
GEORGE LUEDERS & CO. ET AL.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

LESSING ROSENTHAL,
CHARLES H. HAMILL,
LEO F. WORMSER,
Counsel for Petitioner,
Central Trust Company of Illinois

JUDSON HARMON,
EDWARD COLSTON,
A. W. GOLDSMITH,
GEORGE HOADLY,
Counsel for Petitioner,
Covington Savings Bank & Trust Co.,
as Trustee in Bankruptcy.

SOUTHCOTT-WARREN PRINTING COMPANY, CHICAGO.



IN THE

Supreme Court of the United States.

October Term, 1914.

No. 949.

Central Trust Company of Illinois and Covington Savings Bank & Trust Co., as Trustee in Bankruptcy, *Petitioners,*

vs.

George Lueders & Co. *et al.*, *Respondents.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners, Central Trust Company of Illinois and Covington Savings Bank & Trust Co., as trustee in bankruptcy of The I. Rheinstrom & Sons Company, bankrupt, respectfully present this, their petition for a writ of certiorari, directed to the United States Circuit Court of Appeals for the Sixth Circuit and requiring it to certify to this court, for its review and determination, this case, and, thereupon, your petitioners respectfully show:

Statement of the Matter Involved.

The I. Rheinstrom & Sons Company, an Ohio corporation having its principal place of business at Covington, Kentucky, and engaged in preserving and selling "mara-

schino cherries," was adjudged a bankrupt on April 12, 1912, upon an involuntary petition.

Prior to bankruptcy, the respondents had sold and delivered to the bankrupt certain materials and supplies for use in its business. As creditors, the respondents filed not merely their respective proofs of debt, but also their claims for liens upon the property and effects of the bankrupt involved in its business, including the interest of the bankrupt in the real estate used in carrying on its business (Rec., 1-8.)

These claims for liens were asserted by virtue of Section 2487 of the Kentucky Statutes (enacted March 20, 1876) which provides:

> "LIEN OF EMPLOYES AND MATERIAL MEN ON PROPERTY ASSIGNED FOR THE BENEFIT OF CREDITORS.
>
> When the property or effects of any (mine) railroad, turnpike, canal or other public improvement company, or of any owner or operator of any rolling mill, foundry or other manufacturing establishment, whether incorporated or not, shall be assigned for the benefit of creditors, shall come into the hands of any executor, administrator, commissioner, receiver of a court, trustee or assignee for the benefit of creditors, or shall in any wise come to be distributed among creditors, whether by operation of law or by the act of such company, owner or operator, the employes of such company, owner or operator in such business, and the persons who shall have furnished materials or supplies for the carrying on of such business, shall have a lien upon so much of such property and effects as may have been involved in such business, and all the accessories connected therewith, including the interest of such company, owner or operator in the real estate used in carrying on such business. (The amendment of March 23, 1894, inserted 'mine' in first line.)"

The petitioner, Central Trust Company of Illinois (a banking institution, hereinafter sometimes referred to as the "bank"), had loaned money to the bankrupt, and the

bank filed its proof as a general creditor upon a promissory note for $7,832.73 (Rec., 8-11).

On August 31, 1912, the bank, on behalf of itself and all other general creditors, filed objections to the claims for liens. The petitioner, Covington Savings Bank & Trust Co. (which had duly qualified as trustee in bankruptcy, and is hereinafter sometimes referred to as the "trustee"), joined in these objections, praying that the claims be disallowed as claims for liens. There was no objection to the allowance of respondents' claims as unsecured debts. The objections to the lien claims were specific, twenty-three in number, and included every point presented at any time in the course of this litigation or by this petition (Rec., 12-17). The principal objections were that the Kentucky statute did not apply to the business of the bankrupt since the bankrupt did not maintain a "manufacturing establishment" within the meaning of the statute, and that, even if applicable, the statute was void, both because it denied the petitioners the equal protection of the laws under the Fourteenth Amendment to the Constitution of the United States, and because it was in conflict with the Act of July 1, 1898, generally known as the Bankruptcy Law.

The Referee denied the lien claims of the respondents, allowing them only as unsecured debts (Rec., 28-33).

Upon a petition to review the Referee's order, the United States District Court for the Eastern District of Kentucky (A. M. J. Cochran, Judge) entered an order reversing the order of the Referee, overruling all objections of the petitioners, and remanding the cause to the Referee with directions to allow finally the claims of the respondents as prior lien claims upon the property of the bankrupt. (Rec., 100-101.) The District Judge filed an opinion (Rec., 45-100) which is reported in 207 Fed. Rep., 119-164.

Upon an appeal from this order, the United States Circuit Court of Appeals for the Sixth Circuit, on March 2, 1915, entered a judgment of affirmance and filed its opinion (Rec., ——).

Your petitioners submit that the judgment of the Court of Appeals should be brought here for review by this court for the following reasons:

General Reasons Relied on for the Allowance of the Writ.

The principal points on which your petitioners rely are:

First. The Kentucky Statute is so unreasonably discriminatory that it denies your petitioners the equal protection of the laws and thereby violates the provisions of the Fourteenth Amendment to the Constitution of the United States. It gives a lien to those who furnish materials and supplies to manufacturing establishments but denies liens to those who furnish money or machinery to such establishments; it gives a lien to those who furnish materials and supplies to manufacturing establishments but denies liens to those who furnish materials and supplies to establishments not engaged in manufacturing; and it discriminates against manufacturing establishments by imposing liens upon their property and effects, while the property and effects of establishments not engaged in manufacturing are left unencumbered. Such discriminations, your petitioners submit, brand the attempted classification of the Kentucky Statute as capricious, arbitrary, unreasonable, unnatural and not founded upon any proper relation between the class singled out and the object of the discriminatory legislation. Your petitioners submit that this case comes clearly within the decisions of this court holding such legislation obnoxious to the Fourteenth Amendment. Unless the judgment of the Court of Appeals is modified, legislation might be enacted in every state giving liens to an arbitrarily selected class; in one state giving liens to one class, in another giving liens to a different but equally arbitrarily selected class, in a third state giving liens to

a still different but equally arbitrarily selected class, and so on. This case, therefore, presents a constitutional question of deep import and wide scope, and, we submit, merits review and determination by this court. (See Brief I, *infra*.)

Second. If the Kentucky Statute were held applicable in bankruptcy, a striking anomaly and injustice would result. The very filing of a petition in bankruptcy, designed to insure equality in the distribution of the bankrupt's property, would give rise to liens in favor of a special class of creditors and thus produce inequalities. It is noteworthy that the Kentucky Statute designates the time when the property of the debtor shall come into the hands of a receiver or in anywise come to be distributed among creditors, whether by operation of law or otherwise, as the time when the selected class shall acquire a lien upon the property and effects of the debtor. In effect, therefore, the Kentucky Statute provides that the very filing of the petition in bankruptcy shall create liens. Therefore, creditors (excepting those who furnish materials and supplies) must refrain from filing petitions in bankruptcy against their debtors, lest they thereby create priorities in favor of those who furnished materials and supplies and thus subordinate their own claims. Your petitioners submit that the Court of Appeals erred in holding that section 64b of the Bankruptcy Act was intended to sanction such a result. This case, therefore, raises the question whether this statute and similar ones are not in direct conflict with the Bankruptcy Law.

Third. The Kentucky Statute is in derogation of common right and should, your petitioners submit, be strictly construed, especially when invoked in a court of bankruptcy, a forum charged with equal distribution of as-

sets among creditors and created primarily to prevent inequalities. Your petitioners submit that the Court of Appeals erred in holding that the Kentucky Statute belongs to a class of remedial statutes and that, in the application of such statutes, the courts have manifested "a noticeable relaxation in favor of a more liberal construction" and in construing the Kentucky Statute liberally. This case, therefore, presents the question whether or not lien statutes, heretofore always regarded as *stricti juris*, and other statutes in derogation of common right, shall hereafter be deemed subject to liberal construction.

Fourth. The attempted application of the Kentucky Statute to this case presents the question: What is manufacturing? This is a question which, in view of the complexity of modern industries and the increasing amount of legislation affecting such industries, is of constantly enlarging importance, and ought, so far as possible, to be settled. Your petitioners submit that through a series of decisions of this court, beginning with *Hartranft* v. *Wiegmann*, 121 U. S., 609 (based on *Frazee* v. *Moffitt*, 18 Fed., 584), and brought down to *Anheuser-Busch Brewing Association* v. *United States*, 207 U. S., 556, this court has been evolving a definition of the term "manufacturing." The District Court, in its opinion, admittedly declined to subscribe to the reasoning or holding of these decisions. The Court of Appeals, in its opinion, departed from these decisions. Your petitioners submit that to avoid conflicting judicial expressions and contrariety of decisions upon a question of such importance, the writ should be granted so that the question may be reviewed and determined by this court.

Fifth. The attempted application of the Kentucky Statute to this case necessarily involved the rule of stat-

utory construction commonly referred to as "*ejusdem generis.*" This court recently held that the rule must be applied "unless there is a clear manifestation to the contrary," a "manifest legislative intent forbidding the application of the rule." (*United States* v. *Stever*, 222 U. S., 167, 174.) The District Court reversed the presumption and refused to apply the rule, because of the absence of any reason for limiting the statute to establishments of the same class as those specifically enumerated, and the Court of Appeals declined to apply the rule. Your petitioners submit that this case, therefore, presents the question whether or not an established doctrine of statutory construction, heretofore uniformly applied, may be abandoned at pleasure.

Sixth. In opposing the attempted application of the Kentucky Statute to this case, your petitioners raised questions regarding the construction of the statute which had never been in issue in any case arising under it. The Court of Appeals held, however, that these questions should be regarded as "foreclosed" against your petitioners' contention because of decisions of the Court of Appeals of Kentucky and of the Circuit Court of Appeals for the Sixth Circuit, in which the statute had, in fact, been applied, although its application had not been contested or discussed. Your petitioners submit that before a statute can be deemed to have a settled construction, "there must have been an application of the judicial mind to the precise question necessary to be determined." (*Carroll* v. *Lessee of Carroll*, 16 How., 275, 287.) This case, therefore, presents the question whether a decision is to be regarded as a precedent upon a point not presented in the case decided.

WHEREFORE, your petitioners respectfully pray that a writ of *certiorari* be issued out of and under the seal of

this court, directed to the United States Circuit Court of Appeals for the Sixth Circuit, commanding the said court to certify and send to this court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of said Court of Appeals in this case, which was therein entitled *"Central Trust Company of Illinois and Covington Savings Bank & Trust Co., as trustee in bankruptcy, Appellants,* v. *George Lueders & Co., et al., Appellees,"* and numbered 2539, to the end that said cause may be reviewed and determined by this court, as provided by law, and that this honorable court may, thereupon, proceed to correct the errors complained of and reverse the judgment of said Circuit Court of Appeals, and that your petitioners may have such further or other relief or remedy as the nature of the case may require and to this court may seem proper in the premises.

CENTRAL TRUST COMPANY OF ILLINOIS,
by LEO F. WORMSER,
Its Counsel.

COVINGTON SAVINGS BANK & TRUST CO.,
as Trustee in Bankruptcy,
by A. W. GOLDSMITH,
Its Counsel.

STATE OF ILLINOIS, } ss.
COUNTY OF COOK. }

Leo F. Wormser, being duly sworn, says that he is one of the counsel of the petitioner, Central Trust Company of Illinois, in the above entitled cause, and its agent in this behalf, and that, as such, he executed the foregoing petition; that he prepared the same and that the allegations thereof are true, as he verily believes.

.....

Subscribed and sworn to before me by the said Leo F. Wormser, this eighth day of May, 1915; and I hereby certify that I am authorized, under the laws of the State of Illinois, to administer oaths, and that my commission expires on May 2, 1916.

.....

Notary Public in and for the County and State aforesaid.

STATE OF OHIO, } ss.
COUNTY OF HAMILTON. }

A. W. Goldsmith, being duly sworn, says that he is one of the counsel of the petitioner, Covington Savings Bank & Trust Co., as trustee as aforesaid, in the above entitled cause, and its agent in this behalf, and that, as such, he executed the foregoing petition; that he knows the contents thereof and that the allegations thereof are true, as he verily believes.

.....

Subscribed and sworn to before me by the said A. W. Goldsmith this tenth day of May, 1915; and I hereby certify that I am authorized, under the laws of the State of Ohio, to administer oaths, and that my commission expires on ....., 191....

.....

Notary Public in and for the County and State aforesaid.

IN THE

Supreme Court of the United States.

October Term, 1914.

No. 949.

Central Trust Company of Illinois and Covington Savings Bank & Trust Co., as Trustee in Bankruptcy, *Petitioners,*

vs.

George Lueders & Co. *et al.*, *Respondents.*

BRIEF IN SUPPORT OF PETITION.

I.

THE DECISION OF THE COURT OF APPEALS SHOULD BE REVIEWED BECAUSE IT SUSTAINS A STATUTE WHICH VIOLATES THE FOURTEENTH AMENDMENT.

The Kentucky Statute denies the petitioners equal protection of the laws by making unreasonable discriminations in three marked respects:

First: The Statute awards liens to those who furnish materials and supplies to manufacturing establishments, but denies liens to those who furnish any other goods, or machinery, or money to such establishments.

What possible reasonable basis is there for giving a lien to one who furnishes materials and supplies and none to those who furnish any other

merchandise, or machinery, or equipment, or money to the same establishment? Why should the latter "be discriminated against"? In the language of *Gulf, etc., Ry. Co.* v. *Ellis*, 165 U. S., 150, what was the "undisclosed and unknown reason" of the Kentucky Legislature in making such discrimination? Under what permissible rule of classification may the merchant who sells materials and supplies to a manufacturing establishment be favored with a lien, while the banker who advances the money to this establishment, with which to pay the merchant, is left without a lien? (See cases, *infra.*)

Second: The Statute awards liens to those who furnish materials and supplies to manufacturing establishments, but denies liens to those who furnish materials and supplies to other establishments.

What possible reasonable basis is there for giving a lien to one who furnishes coal to a manufacturing establishment and none to one furnishing it to a laundry (held, not a "manufacturing establishment" under the Kentucky Statute)? In the language of *Southern Ry. Co.* v. *Greene*, 216 U. S., 400, what "real and substantial distinction" is there to justify such classification? What "reasonable and just relation" between the class and the thing in respect to which the classification is attempted? (*Gulf, etc., Ry. Co.* v. *Ellis, supra*; *Southern Ry. Co.* v. *Greene, supra*; *Smith* v. *Texas*, 233 U. S., 630; *Chicago, M. & St. P. Ry. Co.* v. *Westby*, 176 Fed., 619 (C. C. A., 8th Circ., Sanborn, J.); *Little* v. *Tanner*, 208 Fed., 605; *Johnson* v. *Goodyear Mining Co.*, 127 Cal., 4; *Off & Co.* v. *Morehead*, 235 Ill., 40.)

Third: The Statute burdens every manufacturing establishment by imposing liens upon its property and effects, while the property and effects of all other establishments are left unencumbered.

What possible reasonable basis is there for imposing liens and thus impairing the credit of establishments merely because they are engaged in manufacturing? Manufacturing establishments, as a class, bear no different relation to the obligation which the Statute seeks to impose upon their property than other establishments not within the class. (See cases, *supra*, and *State* v. *Loomis*, 115 Mo., 307; *State* v. *Goodwill*, 33 W. Va., 179; *Dixon* v. *Poe*, 159 Ind., 492.)

The Statute, if deemed not burdensome but beneficial to manufacturing establishments (by encouraging their credit with persons who furnish materials and supplies) would be equally obnoxious.

If a statute, favoring the credit of manufacturing establishments as against non-manufacturing establishments were valid, why not a statute favoring shoe factories but not hat factories? (*Loan Association* v. *Topeka*, 20 Wall., 655; *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S., 540.)

The Court of Appeals cited (Opinion, point 1) decisions of this court to sustain the validity of the Kentucky Statute against the criticisms urged. Five decisions cited simply uphold statutes abolishing the fellow-servant rule, in extra-hazardous employments. (175 U. S., 348; 199 U. S., 593; 218 U. S., 36; 222 U. S., 251; 235 U. S., 380.) The two remaining cases cited revealed a reasonable basis for the classification. Thus, a statute, regulating entries in coal mines, properly excepted block-coal mines because of the difference between surface mining and sub-surface mining (229 U. S., 26); and a

statute imposing a license tax upon the sale of sewing machines through traveling salesmen was justified by the inherent difference between selling goods in this manner and selling at an established place of business. (233 U. S., 304.)

In contradistinction to such statutes, the attempted classification of the Kentucky Statute rests upon no difference which bears any reasonable or just relation to the subject matter in respect to which the classification is attempted, but is made arbitrarily and without any such basis, and, therefore, is unconstitutional.

II.

THE DECISION OF THE COURT OF APPEALS SHOULD BE REVIEWED BECAUSE IT SUSTAINS A STATE STATUTE IN CONFLICT WITH THE BANKRUPTCY ACT.

The Kentucky Statute provides, in effect, that whenever the property of certain debtors passes into the hands of a receiver in bankruptcy, then those creditors who furnished materials and supplies to the debtor shall have a lien. The very filing of the petition in bankruptcy, therefore, creates liens. Accordingly, by filing a petition to have a debtor adjudged a bankrupt, a special class of creditors can create priority for their claims. A banker, however, even though desirous of preventing dissipation of the debtor's assets, must refrain from filing such a petition, lest he thereby create a priority in favor of that class of creditors who furnished materials and supplies and thus subordinate his own claim to theirs. The Kentucky Statute, therefore, makes the Bankruptcy Act unavailable to all creditors whose claims are not for materials and supplies.

Your petitioners submit that the Kentucky Statute is, to this extent, inconsistent with the purpose of the Bank-

ruptcy Act and repugnant to its spirit, and that Section 64b (5) was designed to preserve only rights which had vested and become perfected prior to bankruptcy and not to create priorities through the very institution of bankruptcy proceedings.

III.

THE DECISION OF THE COURT OF APPEALS SHOULD BE REVIEWED BECAUSE IT DEPARTS FROM THE SETTLED RULE THAT A LIEN STATUTE IN DEROGATION OF COMMON LAW SHOULD BE STRICTLY CONSTRUED.

A. The Statute is in derogation of common law.

"Growing liens are always to be looked at with jealousy."

Lord Ellenborough in *Rushforth* v. *Hadfield*, 7 East, 224, 229.

"It is not to be presumed that the Legislature intended to make any innovation upon the common law further than the case absolutely requires."

Mackin v. *Haven*, 187 Ill., 480, 493.

August v. *Calloway*, 35 Fed., 381, 385-386.

B. "Statutory liens which give a priority of payment to one class of creditors over another are *stricti juris* and are not to be extended beyond the clearly expressed intent of the Legislature."

Rogers v. *Currier*, 79 Mass., 129, 134.

They "cannot be extended from one case to another argumentatively, or by analogy, or by inference."

The Kiersage, 2 Curtiss, C. C., 421.

Buchan v. *Sumner*, 2 Barb. Ch., 165, 195.

19 *Am. & Eng. Encyc. of Law* (2nd Ed.), 24.

C. The Court of Appeals erred in holding that the remedial nature of the statute necessitates liberal construction, because:

(1) The Kentucky courts have construed this statute strictly, holding that "the lien being statutory, all the conditions upon which it is predicated must exist."

Bogard v. *Tyler*, 21 Ky. L. R., 1452, 1454.

(2) Mechanics' lien laws, although remedial (and less severe than the Kentucky Statute), are strictly construed.

May Brick Co. v. *General Engineering Co.*, 180 Ill., 535.

"The statute which gives to a contractor, mechanic or materialman, a lien upon the lands of another, created a remedy in such cases which was unknown to the common law, and, while it must receive a liberal construction to secure the beneficial purposes which the Legislature had in view, it cannot be extended to a state of facts not fairly within its general scope and purview."

Spruck v. *McRoberts*, 139 N. Y., 193, 197.
Thompson v. *Baxter*, 95 Tenn., 305.

D. The Court of Appeals erred in holding that, because the Kentucky Statute should be given a liberal construction, cases construing tariff and tax exemption statutes were inapplicable to this case, because:

(1) The Kentucky court has relied upon tax cases in construing this statute.

Muir v. *Samuels*, 110 Ky., 605.

(2) Although in cases arising under the Tariff Act, duties are not imposed "upon vague or doubtful interpretations," the rule is that "acts imposing duties are not to be construed strictly against the Government, like

penal laws, but so as most effectually to accomplish the intention of the Legislature in passing them."

Rankin v. *Hoyt*, 4 How., 327, 332.

And the rule giving the taxpayer the benefit of the doubt has been held of "no practical use except in cases of extraordinary doubt."

United States v. *Wetherell* (C. C. A., 1st Circ.), 65 Fed., 987, 990.

Moreover, liens ought not to be awarded in derogation of the common equity of all creditors any more readily than taxes ought to be imposed "upon vague or doubtful interpretations."

E. The Kentucky Statute, especially when invoked in a court of bankruptcy, must be strictly construed in order to attain equality in distribution, since "the prime purpose of the Bankruptcy Act is to secure an equal distribution of an insolvent's estate among the creditors."

New River Coal Land Co. v. *Ruffner Bros.* (C. C. A., 4th Circ.), 165 Fed., 881, 886.

F. The Kentucky Statute, unless strictly construed, would result in giving all the assets of the bankrupt to the lien claimants and leave nothing for the general creditors. Therefore, the court is "bound to give heed to the rule that where a particular construction of a statute will occasion great inconvenience or produce inequality and injustice, that view is to be avoided if another and more reasonable interpretation is present in the statute."

Knowlton v. *Moore*, 178 U. S., 41, 77.

IV.

THE DECISION OF THE COURT OF APPEALS SHOULD BE REVIEWED BECAUSE, IN DEPARTING FROM THIS COURT'S DEFINITION OF "MANUFACTURING," IT PRODUCES CONFLICTING JUDICIAL INTERPRETATIONS OF A TERM OF GROWING IMPORTANCE IN MODERN LEGISLATION.

A. The Court of Appeals decision that the bankrupt was engaged in "manufacturing" fails to give effect to the rulings of this court on the legal propositions involved. It departs from the meaning given the term by a series of decisions of this court, which should be maintained because of the increasing amount of legislation on the subject of manufacturing.

Hartranft v. *Wiegmann*, 121 U. S., 609.

Anheuser-Busch Brewing Association v. *United States*, 207 U. S., 556.

"The bankrupt bought cherries preserved in brine and sulphuric acid, extracted the preservative, stemmed, pitted, sweetened, colored and preserved them, and sold them as cherries."

Referee's Statement (Rec., 33, 47), adopted by District Court, 207 Fed., 123.

The cherries, although colored, flavored and preserved, were "still cherries"; and no "new and different article," as defined in the decisions of this court, was produced.

B. The Court of Appeals decision is also in conflict with other Federal cases.

Frazee v. *Moffitt*, 18 Fed., 584; 20 Blatch., 267 (approved in 121 U. S., 609, 615).

City of Memphis v. *St. Louis, etc., R. R. Co.* (C. C. A., 6th Circ.), 183 Fed., 529, 538.

C. The Court of Appeals decision is also in conflict with controlling Kentucky cases.

Muir v. *Samuels*, 110 Ky., 605 (construing this statute).

Standard Tailoring Co. v. *City of Louisville*, 152 Ky., 504 (construing the term "manufacturing establishments" in a Kentucky Statute).

D. The Court of Appeals decision is also in conflict with other cases which have been adopted by other Federal courts, or the Kentucky court.

City of New Orleans v. *Mannessier*, 32 La. Ann., 1075, holding ice cream making not "manufacturing" (adopted in 110 Ky., 605, and 152 Ky., 504).

People ex rel. Union Pacific Tea Co. v. *Roberts*, 145 N. Y., 375, holding that coffee blending, roasting and grinding, producing a special brand, is not "manufacturing" (approved in 183 Fed., 529, 538, *supra*).

People ex rel. New England Dressed Meat & Wool Co. v. *Roberts*, 155 N. Y., 408, holding that the slaughter house business, producing dressed meat, wool, hides and tallow, is not "manufacturing" (approved in *Re White Star Laundry Co.*, 117 Fed., 570, 571 (Dist. Ct. Wis.), and *Re Hudson River Electric Power Co.* (Dist. Ct. N. Y.), 173 Fed., 934, 941.

V.

THE DECISION OF THE COURT OF APPEALS SHOULD BE RE VIEWED BECAUSE IT CAN BE SUSTAINED ONLY BY VIO LATING THE ESTABLISHED RULE OF "EJUSDEM GEN ERIS" IN STATUTORY CONSTRUCTION.

A. Applying the rule of *ejusdem generis* (as it ha been applied to similar statutes), the general term "othe manufacturing establishment" must be limited so as t include only such establishments as are similar to thos specifically enumerated, *i. e.*, rolling mills or foundries

Sandiman v. *Breach*, 7 B. & C., 96 ("Lord Ten terden's Rule").

Rex v. *Inhabitants of Whitnash*, 7 B. & C., 596

United States v. *Stever*, 222 U. S., 167.

Alabama v. *Montague*, 117 U. S., 602.

Newport News Co. v. *United States* (C. C. A. 6th Circ.), 61 Fed., 488.

Re Kemmerer & Co. (Dist. Ct. Pa.), 205 Fed. 108 (construing an almost identical statute)

Barber v. *City of Louisville*, 83 Ky., 95.

Pardee's Appeal, 100 Pa. St., 408.

If the Legislature had intended to include *all* manu facturing establishments, whether similar to those spe cifically enumerated or not, "IT WOULD HAVE BEEN EAS TO SAY SO." This is a recognized doctrine, disregarde by the Court of Appeals.

United States v. *Chase*, 135 U. S., 255, 259.

Shaw v. *Railroad Company*, 101 U. S., 557, 565

National Bank v. *Matthews*, 98 U. S., 621, 627

B. This court has recently said that the rule o *ejusdem generis* must be applied "unless there is a clea manifestation to the contrary," a "manifest legislativ

intent forbidding the application of the rule of construction referred to."

United States v. *Stever*, 222 U. S., 167, 174.

There is no such intent manifested in the Kentucky Statute and the Court of Appeals erred in not applying this doctrine.

VI.

THE DECISION OF THE COURT OF APPEALS SHOULD BE REVIEWED BECAUSE IT HOLDS THAT A DECISION IS A PRECEDENT UPON A POINT NOT RAISED OR PRESENTED.

The petitioners maintained that the statute applied only to manufacturing establishments similar to those specifically enumerated. The Court of Appeals held that the petitioners' rights upon this question were "foreclosed," though admitting that "in none of the cases was the doctrine of *ejusdem generis* referred to." (Opinion, point 2.) The Court of Appeals "foreclosed" the petitioners, upon the ground that since the statute had been applied in certain cases to establishments not similar to those specifically enumerated, those cases must be regarded as deciding that the statute applied to all manufacturing establishments, even though the question of its application was not raised, and that, therefore, a construction had been adopted which was inconsistent with that urged by the petitioners.

The Court of Appeals, we submit, erred in this conclusion, because a decision cannot be regarded as a precedent upon a point not presented in the case decided. This court said, in *Carroll* v. *Lessee of Carroll*, 16 How., 275, 287, that even where there has been a *dictum*, full consideration of the issue is not precluded and the rights of the parties not foreclosed:

> "There must have been an application of the judicial mind to the precise question necessary to be determined to fix the rights of the parties."

If a *dictum* (when not fully considered) is not concl sive, *a fortiori* an opinion, without even a *dictum* the point, is not in any sense a precedent.

In *St. Louis, etc., R. R. Co.* v. *Terre Haute, etc., R. Co.*, 145 U. S., 393, 403-4, this court said:

> "Upon questions * * * not considered at a the case cannot be regarded as a decision."

In *Celluloid Mfg. Co.* v. *Tower*, 26 Fed., 451, 452 (Cir Ct. Mass.), the court, by Carpenter, J., said:

> "But the fact that the question of patentabili was not argued deprives the decision of all weig as a precedent in this case where the question raised and argued. No decision, as it seems to u can amount to a precedent unless made after fu argument."

See, also, *Boyd* v. *Alabama*, 94 U. S., 645, 648.

The decision of the Court of Appeals is, in effect, holding that previous adjudications shall operate foreclose litigants and preclude the court in subsequen cases from construing a statute, because the point migh have been raised and determined previously. This is striking departure from the doctrines established by thi court.

Respectfully submitted,

LESSING ROSENTHAL,
CHARLES H. HAMILL,
LEO F. WORMSER,
Counsel for Petitioner,
Central Trust Company of Illinoi

JUDSON HARMON,
EDWARD COLSTON,
A. W. GOLDSMITH,
GEORGE HOADLY,
Counsel for Petitioner,
Covington Savings Bank & Trust Co.
as Trustee in Bankruptcy.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1915.

No. 445

CENTRAL TRUST COMPANY OF ILLINOIS
and
COVINGTON SAVINGS BANK & TRUST CO.,
AS TRUSTEE IN BANKRUPTCY,

Appellants,

vs.

GEORGE LUEDERS & CO., ET AL.,

Appellees.

JOINT MOTION.

And now come the appellant, Central Trust Company of Illinois, and the appellant, Covington Savings Bank & Trust Company, as trustee of The I. Rheinstrom & Sons Company, bankrupt, and the appellees, George Lueders & Co., G. S. Nicholas & Co. and D. A. White Company, by their respective counsel and attorneys, and jointly move (1) that the motion of the appellees, heretofore filed herein, to dismiss the appeal be advanced for hearing to an early date to be fixed by the court, without awaiting the hearing of this cause on the merits; (2) that oral argument upon the said motion to dismiss the appeal be granted; and (3) that such further or other orders be entered by this court as may be necessary to attain the objects of this motion.

A BRIEF STATEMENT OF THE MATTER INVOLVED WITH THE REASONS FOR THE APPLICATION.

This is an appeal (allowed April 27, 1915; Rec., 126) from a decree of the United States Circuit Court of Appeals for the Sixth Circuit (entered March 2, 1915; Rec., 112), affirming the decree of the District Court of the United States for the Eastern District of Kentucky. The decree of the District Court allowed the claims of the appellees and other creditors similarly situated for materials and supplies furnished the bankrupt for the purpose of carrying on its business, as prior lien claims upon so much of the property and effects of the bankrupt as may have been involved in its business and all accessories connected therewith, including the interest of said bankrupt in the real estate used in carrying on such business (Decree, entered Aug. 21, 1913; Rec., 100-1) by virtue of Section 2487 of the Kentucky statutes.

Against the objections of appellant, Central Trust Company of Illinois, the court adjudged that the Kentucky statute did not deny the appellant, Central Trust Company of Illinois, or any other creditor, the equal protection of the laws nor deprive any person of property without due process of law and did not conflict with the Fourteenth Amendment of the Constitution of the United States.

The motion to dismiss this appeal is based upon the contention that, as the decree below was entered in a proceeding arising under the Bankruptcy Act, this court has no jurisdiction to review such decree on appeal, because of Sections 4 and 6 of the Amendment of January 28, 1915, to the Judicial Code of the United States which provides:

> "That the judgments and decrees of the circuit courts of appeals in all proceedings and cases arising under the Bankruptcy Act and in all controversies arising in such proceedings and cases shall be final," etc.

The Amendment has not been judicially defined or construed.

A disposition of this motion to dismiss the appeal involves a construction of the Amendment and is not only of general public interest, but is of particular importance to District and Circuit Courts of Appeal.

Furthermore in the case at bar, the trustee cannot make distribution of the funds of the bankrupt estate until this appeal has been disposed of. Should, however, this motion be granted by the court, it would not only permit an earlier winding up of the bankrupt estate, but would prevent the further expense involved in a hearing of this case on the merits.

Because the disposition of the motion to dismiss the appeal must depend upon a construction of the Amendment of January 28, 1915, and because of the importance

of the Amendment, oral argument upon the motion is respectfully requested.

LESSING ROSENTHAL,
CHARLES H. HAMILL,
LEO F. WORMSER,
Counsel for Appellant,
Central Trust Company of Illinois.

JUDSON HARMON,
EDWARD COLSTON,
A. W. GOLDSMITH,
GEORGE HOADLY,
Counsel for Appellant,
Covington Savings Bank & Trust Co.,
as Trustee in Bankruptcy.

WALTER A. DECAMP,
DUDLEY V. SUTPHIN,
LEO J. BRUMLEVE, JR.,
Counsel for Appellees,
George Lueders & Co. and
G. S. Nicholas & Co.

EDWARD F. PETERS,
PAUL V. CONNOLLY,
Counsel for Appellee,
D. A. White Company.

Supreme Court of the United States

OCTOBER TERM, 1914.

CENTRAL TRUST COMPANY OF ILLINOIS and COVINGTON SAVINGS BANK & TRUST COMPANY, as Trustee in Bankruptcy,

Appellants,

No. 949. vs.

GEORGE LUEDERS & COMPANY, et al,

Appellees.

MOTION TO DISMISS APPEAL.

And now comes George Lueders & Company, G. S. Nicholas & Company and D. A. White Company, the appellees above named, by their attorneys, and move that the appeal taken herein be dismissed for the reason that this court has no jurisdiction of the same upon the following grounds:

This is an appeal from the final decree of the Circuit Court of Appeals of the Sixth Circuit allowing the claims of the appellees as prior lien claims upon the property of the bankrupt, The I. Rheinstrom & Sons Company.

The facts in the case are, briefly, these: The I. Rheinstrom & Sons Company, an Ohio corporation doing business at Ludlow, Kentucky, was adjudicated a bankrupt on April 12, 1912. The appellees filed their proofs of claim for materials and supplies sold to the bankrupt and claimed a first lien upon so much of the property and effects as may have been involved in the business of the bankrupt and all the accessories connected therewith, including the interest of the company in the real estate used in carrying on such business by virtue of Section 2487 of the Kentucky Statutes. The appellants contested these claims on the ground that the bankrupt was not a company contemplated by this act and that Kentucky Statute is so unreasonably discriminatory that it denied the appellants the equal protection of the laws and thereby violated the provisions of the Fourteenth Amendment to the Constitution of the United States. The Referee denied the lien claims of the appellees, allowing them only as unsecured debts. Upon a petition to review the Referee's order, the United States District Court for the Eastern District of Kentucky, (Hon. A. M. J. Cochran, Judge), entered an order reversing the order of the Referee, overruling all objections of the appellants, and remanding the cause to the Referee with instructions to allow finally the claims of the appellees as prior lien claims upon the property of the bankrupt. Upon an appeal from this order the United States Circuit Court of Appeals for the Sixth Circuit entered a judgment of affirmance.

This cause involves a judgment of a Circuit Court of Appeals, which is made final by the judiciary act of

March 3, 1911, as amended on January 28, 1915, and therefore it is not reviewable by this Honorable Court.

WALTER A. DECAMP,
DUDLEY V. SUTPHIN,
LEO J. BRUMLEVE, JR.,
Counsel for Appellees,
George Lueders & Co.,
G. S. Nicholas & Co.,
EDWARD F. PETERS,
PAUL V. CONNOLLY,
Counsel for Appellee,
D. A. White Company.

July 15, 1915.

Supreme Court of the United States

OCTOBER TERM, 1914.

CENTRAL TRUST COMPANY OF ILLINOIS and COVINGTON SAVINGS BANK & TRUST COMPANY, as Trustee in Bankruptcy,

Appellants,

No. 949. vs.

GEORGE LUEDERS & COMPANY et el,

Appellees.

BRIEF OF APPELLEES ON MOTION TO DISMISS APPEAL.

STATEMENT OF FACTS.

The I. Rheinstrom & Sons Company is a corporation organized under the laws of the state of Ohio, and until February 19, 1912, was engaged in the business of manufacturing what are commonly called "Maraschino" cherries, their principal place of manufacture being in the city of Ludlow, state of Kentucky. On February 19, 1912, a petition in bankruptcy was filed against said company, and on April 12, 1912, the company was duly adjudicated a bankrupt.

Among the claims which were filed against said bankrupt, was a certain class of claims for materials and supplies furnished the bankrupt for the purpose of carrying on the business of manufacturing "Maraschino" cherries. The claims of George Lueders & Company, G. S. Nicholas & Company and D. A. White Company, appellees, are typical of the creditors who come within this class. George Lueders & Company and G. S. Nicholas & Company are New York concerns engaged, among other things, in the business of importing various high grade oils and liqueurs. George Lueders & Company furnished the bankrupt with what is known as "Marask" water, a liqueur which is brewed in France from a certain class of cherries grown in that vicinity; also oil of bitter almond, oil of syringa and a synthetic article for flavoring, while G. S. Nicholas & Company had furnished the bankrupt with "Maraschino" liqueur, which is manufactured in Dalmatio, Austria. The D. A. White Company had furnished the bankrupt with sugar. These creditors, together with other creditors whose claims were for materials and supplies furnished the bankrupt, filed their claims for a lien under and by virtue of Sections 2487 to 2491 of the Kentucky Statutes. The language of 2487 is particularly pertinent and reads as follows:

> "When the property or effects of any mine, railroad, turnpike, canal or other public improvement company, or of any owner or operator of any rolling mill, foundry or other manufacturing establishment, whether incorporated or not, shall be assigned for the benefit of creditors, shall come into the hands of any executor, administrator, commissioner, receiver of a

court, trustee or assignee for the benefit of creditors, or shall in any wise come to be distributed among creditors, whether by operation of law or by the act of such company, owner or operator, the employees of such company, owner or operator in such business, and the persons who shall have furnished materials or supplies for the carrying on of such business, shall have a lien upon so much of such property and effects as may have been involved in such business, and all the accessories connected therewith, including the interest of such company, owner or operator in the real estate used in carrying on such business." [The amendment of March 23, 1894, inserted "mine" in first line.]

August 31st, 1912, the Central Trust Company of Illinois, a general creditor of the bankrupt, filed objections to the granting or allowance of any such liens as were claimed by the particular creditors above mentioned and the matter was fully presented and argued before the Honorable Martin M. Durrett, Referee. Shortly thereafter the Covington Savings Bank & Trust Company, Trustee, joined in these objections. On November 20, 1912, the Referee denied the lien claims of the appellees allowing them only as unsecured debts. On December 5, 1912, a petition to review this order of the Referee was filed in the District Court of the United States for the Eastern District of Kentucky and after the matter was fully presented and argued Honorable A. M. J. Cochran, the District Judge, filed a most able and exhaustive opinion on June 16, 1913 (reported in 207 Federal Reporter, 119-164), reversing the order of the Referee and overruling all objections of the appellants. The cause was

remanded to the Referee with directions to allow finally the claims of the appellees as prior lien claims upon the property of the bankrupt. Upon an appeal from this order the United States Circuit Court of Appeals of the Sixth Circuit on March 2, 1915, entered a judgment of affirmance and filed its opinion. (Reported in 221 Federal Reporter, 829. Advance sheets dated June 10, 1915.) The Circuit Court of Appeals allowed an appeal of this cause to this Honorable Court on April 27, 1915. We contend that this case is not appealable for the following reasons:

ARGUMENT.

The jurisdiction of this Honorable Court in bankruptcy cases is governed by Sections 4 and 6 of the amendment of January 28, 1915, to the Judiciary Act of the United States approved March 3, 1911. Section 4 of this amendment is as follows:

> "That *the judgments and decrees of the circuit courts of appeals in all proceedings and cases arising under the Bankruptcy Act and in all controversies arising in such proceedings and cases shall be final*, save only that it shall be competent for the Supreme Court to require by *certiorari*, upon the petition of any party thereto, that the proceeding, case, or controversy be certified to it for review and determination, with the same power and authority as if taken to that court by appeal or writ of error; but *certiorari* shall not be allowed in any such proceeding, case, or controversy unless the petition therefor is presented to the Supreme Court within three months from the date of such judgment or decree." [Italics our own.]

In this instant case the judgment and decree of the Court of Appeals of the Sixth Circuit finally allowed the

claims of the appellees as prior lien claims upon the property of the bankrupt. It is therefore a judgment and decree of a Circuit Court of Appeals in a proceeding and case arising under the Bankruptcy Act. In view of this it is manifest that by virtue of Section 4 of the amendment aforesaid this is a case in which the decree of the Court of Appeals is final. A review of this case by this Honorable Court can only be had by *certiorari*. In May, 1915, within three months from the date of the decree the appellants duly applied for such a writ, which this Court refused to grant on June 14, 1915.

This amendment controls the appeal of this cause. This is evident by Section 6 of this Act, which reads as follows:

> "That this Act shall *not affect cases now pending in the Supreme Court of the United States or cases in which writs of error or appeals have been allowed at the date of its approval.* And nothing in this Act shall be deemed to repeal, amend, or modify the provisions of an Act entitled 'An Act providing for writs of error in certain instances in criminal cases' approved March second, nineteen hundred and seven." [Italics our own.]

The case was not pending in the Supreme Court, nor had a writ of error or appeal been allowed at the date of the approval of this act, to-wit, January 28, 1915. In fact, the judgment and decree of the Circuit Court of Appeals was not rendered until March 2, 1915, and no appeal was allowed by the Court until April 27, 1915.

As this case involved a constitutional question, the appellants could have appealed it to this Honorable Court direct from the judgment and decree of the District

Court by virtue of Section 238 of the Act of March 3, 1911. They chose, however, to appeal this cause to the Court of Appeals. As this is one of the class of cases of which the courts of appeal have final jurisdiction, and as the case has been determined by the Court of Appeals on its merits, another appeal can not be maintained to this Honorable Court, even though the case involves constitutional rights. Such case can be taken to the Supreme Court only upon *certiorari*.

Carey Manufacturing Company v. *Acme Flexible Clasp Company*, 187 U. S., 427.
Huguley Manufacturing Company v. *Galeton Cotton Mills*, 184 U. S., 546,
American Sugar Refining Company v. *City of New Orleans*, 181 U. S., 277.
Robinson v. *Caldwell*, 165 U. S., 359.

In view of this we submit with deference that the appeal taken herein should be dismissed.

Respectfully submitted,

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D. A. White Company.

July 15, 1915.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1915.

No. 445

CENTRAL TRUST COMPANY OF ILLINOIS
and
COVINGTON SAVINGS BANK & TRUST CO.,
AS TRUSTEE IN BANKRUPTCY,
Appellants,

vs.

GEORGE LUEDERS & CO., ET AL.,
Appellees.

BRIEF OF APPELLANTS IN OPPOSITION TO MOTION TO DISMISS APPEAL.

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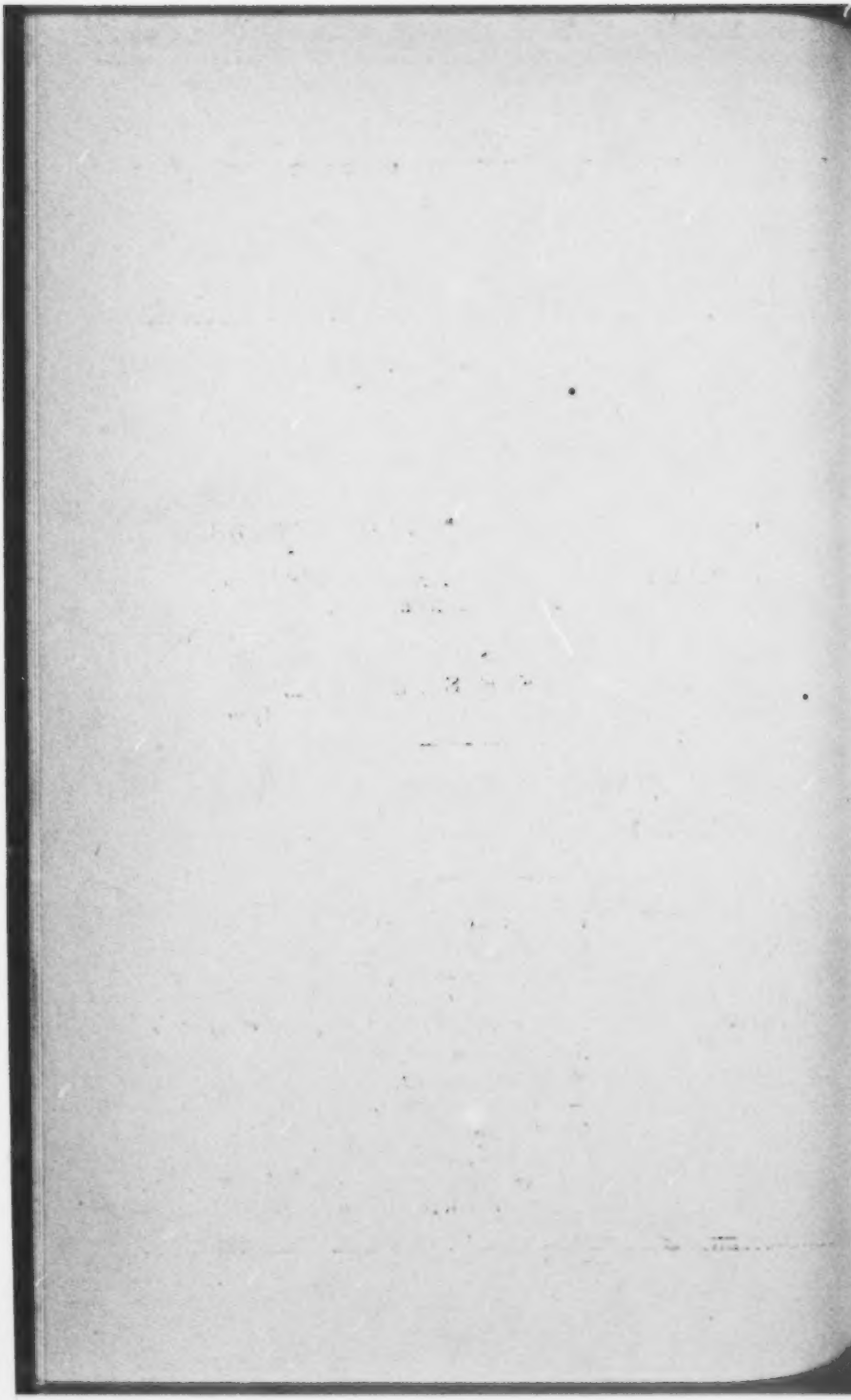
as Trustee in Bankruptcy

DUNLOP-WARREN PRINTING COMPANY, CHICAGO.



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AS TRUSTEE IN BANKRUPTCY,
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Appellees.

BRIEF OF APPELLANTS IN OPPOSITION TO MOTION TO DISMISS APPEAL.

MAY IT PLEASE THE COURT:

The motion to dismiss this appeal is based upon the ground that this court is without jurisdiction, because of Section 4 of the Amendment of January 28, 1915, to the Judicial Code, which (save only by review upon writ of certiorari, denied in this cause) provides:

> "That the judgments and decrees of the circuit courts of appeals in all proceedings and cases arising under the Bankruptcy Act and in all controversies arising in such proceedings and cases shall be final," etc.

The facts, as set forth in appellees' motion are sufficiently stated for the purpose. However, to ascertain

the character of this appeal, the original proceedings must be examined.

THE ISSUES BEFORE THE REFEREE.

1. The lien claim of the appellees (claimants below), filed under Section 2487 of the Kentucky statutes,* was a claim to property in the possession of the trustee, independent of the claimants' respective proofs of debt (Rec., 1; 4). The claims were conceded as general claims. The contest turned upon the question whether the phrase of the Kentucky statute, "or other manufacturing establishment," included the business of the bankrupt. The objections filed by the appellant, Central Trust Company of Illinois (a general creditor of the bankrupt) were not directed to the proofs of debt, but to the independent claims for a lien (Rec., 12-17). This left nothing in controversy but the question of the right to liens, under the Kentucky statute. The issue thus joined was not raised under the Bankruptcy Act, but under the Kentucky statute. It presented a separate collateral controversy, distinct from the proceeding in bankruptcy.

2. The appellant, Central Trust Company of Illinois, in joining issue with the lien claimants, in its first pleading filed in this cause and at its first oppor-

*"When the property or effects of any (mine), railroad, turnpike, canal or other public improvement company, or of any owner or operator of any rolling mill, foundry or other manufacturing establishment, whether incorporated or not, shall be assigned for the benefit of creditors, shall come into the hands of any executor, administrator, commissioner, receiver of a court, trustee or assignee for the benefit of creditors, or shall in any wise come to be distributed among creditors, whether by operation of law or by the act of such company, owner or operator, the employes of such company, owner or operator in such business, and the persons who shall have furnished materials or supplies for the carrying on of such business shall have a lien upon so much of such property and effects as may have been involved in such business, and all the accessories connected therewith, including the interest of such company, owner or operator in the real estate used in carrying on such business."

tunity, specifically objected to the award of liens on the ground that the Kentucky statute violated the Fourteenth Amendment to the Constitution of the United States (Rec., 12-17). The issue thus joined was not raised under the Bankruptcy Act, but under the Constitution; and did not relate to the administration in bankruptcy, but to the construction of the Constitution and its application to a state statute.

THE DECREE OF THE DISTRICT COURT.

The decree of the District Court of the United States for the Eastern District of Kentucky, which reversed the order of the Referee and awarded liens to the appellees, adjudged that the Kentucky statute did not deny the appellant, Central Trust Company of Illinois, or any other creditor, the equal protection of the laws, nor deprive any person of property without due process of law and did not conflict with the Fourteenth Amendment to the Constitution of the United States (Rec., 100-1).

THE JUDGMENT OF THE CIRCUIT COURT OF APPEALS.

The judgment of the United States Circuit Court of Appeals for the Sixth Circuit affirmed the decree of the District Court (Rec., 112). Subsequently, and after the enactment of the Amendment, the court allowed this appeal.

POINTS AND AUTHORITIES.

The appellants maintain that the jurisdiction of this court, conferred by Section 241 of the Judicial Code (as construed in *Houghton* v. *Burden*, 228 U. S., 161, 165), has not been divested by the Amendment of January 28, 1915, and that, therefore, the motion to dismiss this appeal should be denied upon the following grounds:

I. Where an Act of Congress is directed to a class of cases which had so increased in number as to impose a burden of litigation upon this court, the Act will be given effect in the light of the object of its enactment and will not be construed as a limitation upon the jurisdiction of this court in a case not belonging to that class, even though the operation of the Act must be restrained within narrower limits than its literal words import.

United States v. *American Bell Telephone Co.*, 159 U. S., 548.

Petri v. *Commercial National Bank of Chicago*, 142 U. S., 644, 650.

Church of the Holy Trinity v. *United States*, 143 U. S., 457, 459, 463.

United States v. *Rabinowich*, 238 U. S., 78.

II. Where the correctness of a judgment of the Circuit Court of Appeals depends upon the construction or application of the Constitution of the United States, the defeated party, provided it has asserted its constitutional rights from the outset, is entitled, as of right, to a re-examination of the judgment by this court, even though the decree of the District Court was rendered sitting in bankruptcy.

Spreckels Sugar Refining Co. v. *McClain*, 192 U. S., 397.

ARGUMENT.

I.

The argument of the appellees that the Amendment of January 28, 1915, ousts the jurisdiction of this court because the Amendment makes final the judgment of the Circuit Courts of Appeals "in all proceedings and cases arising under the Bankruptcy Act," is based upon the literal meaning of the words, without respect to the object of the enactment of the Amendment. This disregards the established rule of statutory construction that it is the duty of the court in construing a statute

> "to restrain its operation within narrower limits than its words import, if the court is satisfied that the literal meaning of its language would extend to cases which the legislature never intended to include in it."
>
> *Petri* v. *Commercial National F[illegible]f Chicago*, 142 U. S., 644, 650.

And this court has said:

> "It is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers. This has been often asserted, and the reports are full of cases illustrating its application. This is not the substitution of the will of the judge for that of the legislator, for frequently words of general meaning are used in a statute, words broad enough to include an act in question, and yet a consideration of the whole legislation, or of the circumstances surrounding its enactment, or of the absurd results which follow from giving such broad meaning to the words, makes it unreasonable to believe that the legislator intended to include the particular act."
>
> *Church of the Holy Trinity* v. *United States*, 143 U. S., 457, 459.

This court has pointed out that a helpful

> "guide to the meaning of a statute is found in th evil which it is designed to remedy; and for thi the court properly looks at contemporaneous event the situation as it existed, and as it was presse upon the attention of the legislative body." (*Ibid* 463.)

The motives and history of the passage of the Amend ment of January 28, 1915, are matters of common knowl edge. An examination of the reported decisions show that this court has been burdened with a great mass o litigation relating to questions involved in the adminis tration of bankrupt estates, commencing with the peti tion for adjudication, ending with the discharge and in cluding matters of administration generally, such as preferences, what debts are provable, exemptions, allow ance and disallowance of claims and similar administra tive questions which occur in the settlement of the estate This court has also been frequently called upon to deter mine whether, in given cases, an appeal or a petition to review and revise constituted the proper appellate pro cedure, depending upon whether the case arose under section 24 (a) and (b) or section 25 of the Bankruptcy Act. The Amendment operates to relieve this court of passing further on all such questions.

For a certain period of time, it was necessary that such questions should be reviewed by this court, in order that the meaning of the Bankruptcy Act might be finally determined, but now that this court has, by a series of decisions rendered since 1898, established the principles applicable to these questions, it should be relieved of the burden of this class of litigation, so as not to overcrowd its docket and impede the disposition of cases of greater gravity and general importance.

In moving the passage of the amendment in both

houses, it was said, on behalf of the Committee on the Judiciary:

> "The bankruptcy law has now been so thoroughly construed that there is not much doubt about any of its provisions, and cases coming to the Supreme Court under it involve complicated questions of fact rather than of law." (*Congressional Record*, Vol. 52, No. 10, p. 302; *Congressional Record*, Vol. 52, No. 14, pp. 456-7.)

This is the evident purpose of the enactment of the Amendment of January 28, 1915, and we submit that it must be applied so as to carry out that purpose and not be extended in its application so as to defeat rights not intended to be affected.

The questions presented upon this appeal do not belong to the class, from the burden of which the Amendment was designed to relieve this court. They are not administrative questions, arising in the course of bankruptcy proceedings. (See, Opinions, 207 Fed., 119-164; 221 Fed., 829.)

Fundamentally, there is involved the validity of a state statute under the Constitution of the United States —the most momentous question which can be presented to this court.

Jurisdiction having once attached, consideration will necessarily be given to (a) the definition of what constitutes "manufacturing,"—a question which, in view of the complexity of modern industries and the increasing amount of legislation affecting them, is of constantly increasing importance and ought not be the subject of conflicting judicial opinions; (b) the question whether there has been such "a noticeable relaxation in favor of a more liberal construction," as asserted in this case by the Court of Appeals (Rec., 119), that lien statutes, heretofore always regarded

as *stricti juris*, and other statutes in derogatio of common right, shall hereafter be deemed sul ject to liberal construction; (c) the application of th doctrine of *ejusdem generis* in apparent conflict with th recent opinion (222 U. S., 167, 174) of this court; an (d) the question whether the rights of litigants shoul be "foreclosed" (Rec., 114) by a ruling that an earli decision is to be regarded as a precedent upon a poi not presented in the case decided.

These are all questions of general, legalistic importan and unconfined by the narrow bounds of bankruptcy pr cedure.

United States v. *American Bell Telephone Compan* 159 U. S., 548, is, in principle, quite like the case at ba and amply sustains our position. It was there claim that because of the provision of Section 6 of the Judicia Act of March 3, 1891 (now Sec. 128 of the Judicial Code making the judgment of the Circuit Court of Appea final in all cases "arising under the patent laws," th court had no jurisdiction of an appeal from a decree the Circuit Court of Appeals, reversing a decree of t District Court, upon a bill filed by the United Stat to cancel a patent granted to the defendant co pany. But this court held that it was not bound by t literal language of the statute. It looked to the *obje* of the enactment and said that the motion to dismiss t appeal would "be disposed of upon the inquiry wheth it was manifestly the *intention* of Congress to inclu such a case as that before us in the words, 'arising u der the patent laws.'" (p. 553.) The court stated th the object of the Act was "to relieve this court of t overburden of cases and controversies arising from t rapid growth of the country and the steady increase

litigation." (p. 551.) Continuing, Mr. Chief Justice Fuller, delivering the opinion, said:

> "Now, actions at law for infringement, and suits in equity for infringement, for interference and to obtain patents, are suits which clearly arise under the patent laws, being brought for the purpose of vindicating rights created by those laws, and coming strictly within the avowed purpose of the act, to relieve this court of that burden of litigation which operated to impede the disposition of cases of peculiar gravity and general importance. We are of opinion that it is reasonable to assume that the attention of Congress was directed to this class of cases, and that the language was used as applicable only to them; and that there is nothing in the objects sought to be attained and the mischiefs sought to be remedied by the act which furnishes foundation for the belief that Congress manifestly intended to place a limitation on the appellate jurisdiction of this court in a case such as this." (pp. 553-4.)

By parity of reasoning, the motion in this case should be denied because it was manifestly not the intention of Congress to include in the Amendment, relating to cases "arising under the Bankruptcy Act," a case such as this where the determination of the rights of the parties depends upon the construction of a state statute and the application of the Constitution of the United States to the statute.

Just as suits for infringement, for interference and for obtaining patents are characteristic examples of the class of cases "arising under the patent laws," at which the limitation of Section 6 of the Act of March 3, 1891, was aimed, so cases involving administrative questions form the class of cases "arising under the Bankruptcy Act," at which the Amendment of January 28, 1915, was aimed. Accordingly, in the present case, as in the Telephone case, the amendment ought not to be extended beyond the class it was designed to reach.

It is true that in the Telephone case, the decision was rested, in part, upon the fact that the United States was a party; but in the present case, on account of the constitutional question involved, no less than in the Telephone case, on account of the character of the plaintiff, this court "cannot impute to Congress the intention of narrowing the appellate jurisdiction of this court." (p. 555.) A denial by a state statute of a federal, constitutional right deeply concerns the public interests and such a case does not fall within the reason of the limitations of the Amendment.

The issue raised under the Kentucky Statute in this case presented a separate, collateral controversy distinct from the proceeding in bankruptcy. It is noteworthy that the claims were not for a priority created under the Bankruptcy Act, but claims to property in the possession of the trustee and against which the appellees sought to foreclose their alleged statutory liens.

The character of the issue is strikingly illustrated by assuming that, without any petition in bankruptcy being filed, The I. Rheinstrom & Sons Company had made a voluntary assignment. Under the provisions of Section 2487 of the Kentucky Statute, the lien arises whenever the property or effects of the debtor "shall in anywise come to be distributed among creditors, whether by operation of law or by the act of such company." Being opposed, the appellees would have instituted suit, either in a state or federal court, to enforce their liens and acquire possession of the property. It is clear that, under such circumstances, an independent issue not related in any way to the Bankruptcy Act would have been presented.

We submit that the mere change of forum in the present case does not change the issue, that its independent

character remains unaffected and that, therefore, the Amendment of January 28, 1915, does not apply.

Not every matter that grows out of a proceeding in the bankruptcy court is a case "*arising under* the Bankruptcy Act." Where an indictment charged the bankrupt and others with a conspiracy to commit crimes against the United States, by planning to have a petition in bankruptcy filed against them and then, while bankrupts, to conceal from the trustee property belonging to the bankrupt estate, this court held that the general statute of limitations, § 37 of the Criminal Code, applied and not § 29(d) of the Bankruptcy Act, although the latter expressly provides the limitation for "any offense arising under this Act." *United States* v. *Rabinowich*, 238 U. S., 78.

II.

Where, as here, the correctness of the judgment of the Circuit Court of Appeals depends upon the application of the Constitution of the United States to a state statute, the amendment of January 28, 1915, is inapplicable.

In *Spreckels Sugar Refining Co.* v. *McClain*, 192 U. S., 397, the plaintiff sought to recover certain sums paid under protest to the Collector of Internal Revenue, alleged to have been unlawfully exacted under the War Revenue Act of June 13, 1898, upon the ground, among others, that Section 27 of the Act was unconstitutional. The Government insisted that this court had no jurisdiction because the sixth section of the Judiciary Act of March 3, 1891, provides that the judgments or decrees of the Circuit Courts of Appeals shall be final in all cases "arising under the revenue laws." This court, however, denied the motion to dismiss the appeal and held that the

plaintiff was entitled, of right, to a review by this court, saying:

> "Looking at the purpose and scope of the act of 1891, we are of opinion that the position of the Government on this point cannot be sustained. It rests upon an interpretation of the act that is too technical and narrow. The meaning of the words 'arising * * * under the revenue laws,' in the sixth section, is satisfied if they are held as embracing a case strictly arising under laws providing for internal revenues and which does not, by reason of any question in it, belong also to the class mentioned in the fifth section of that act. We do not think that the words quoted necessarily embrace a case carried to the Circuit Court of Appeals, which, although arising under the revenue laws, and involving a construction of those laws, depends for a full determination of the rights of the parties upon the construction or application of the Constitution, or upon the constitutionality of an act of Congress. We lean to that interpretation of the act which enables the defeated party in such a case in the Circuit Court of Appeals to have, as of right, upon writ of error to that court, a re-examination here of the judgment (the requisite amount being involved) if the correctness of the judgment depends in whole or in part upon the application or construction of the Constitution, or upon the constitutionality of any act of Congress drawn in question" (pp. 408-9).

In the present case as in the Spreckels case, where, from the outset, upon the appellants' showing, the application of the Constitution was involved, the judgment of the Circuit Court of Appeals should be held not to be final.

Conclusion.

In conclusion, it is submitted that where appellate jurisdiction is conferred in general terms so as to comprehend the particular case (as in this case, by Sec. 241 of the Judicial Code), the limitation by amendment

is to be strictly construed and no presumption indulged of an intention to restrict such jurisdiction, without a clear manifestation of such purpose. To assume that the Amendment of January 28, 1915, was calculated to comprehend every case within the literal meaning of its words necessitates an abandonment of that doctrine of statutory construction, which lays emphasis no less upon the legislative intent than upon its language, and demands a surrender of the principle that the jurisdiction of a court can be taken away only by positive and unmistakable enactment. To assume that the Amendment was designed to abolish a review by this court of a denial of constitutional rights—dependent merely on the forum in which such rights have been claimed—involves a departure from the prevailing doctrine too radical to be justified.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1914.

CENTRAL TRUST COMPANY OF ILLINOIS and COVINGTON SAVINGS BANK & TRUST COMPANY, as Trustee in Bankruptcy,

Petitioners,

No. 949. *vs.*

GEORGE LUEDERS & COMPANY et al,

Respondents.

Brief in Opposition to Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

To the Honorable, the Chief Justice, and the Associate Justices of the Supreme Court of the United States:

We respectfully submit that the motion of the petitioners for a writ of *certiorari* should not be granted because the reasons assigned in the petition are insufficient when tested by the rulings of this Honorable Court. It has been repeatedly held that the power to grant such writ will be sparingly exercised, and only when the circumstances of the case satisfies the court that the importance of the questions involved, the necessity of avoiding conflict between two or more Courts of Appeal or between

Courts of Appeal and Courts of a state, or some matter affecting the interests of this nation in its internal or external relations, demands it.

Forsythe v. *Hammond*, 166 U. S., 506.
Ex parte Woods et al, 143 U. S., 202.
Lau Ow Bew v. *United States*, 144 U. S., 47.
American Construction Co. v. *Jacksonville T. & K. W. R. Co.*, 148 U. S., 372.

The petition and record herein (as we will point out more particularly hereafter) do not present a case involving such questions.

I.

The Decision of the Court of Appeals Should Not be Reviewed Because the Statute Which it Sustains Does Not Violate the Fourteenth Amendment.

The asserted ground of unconstitutionality, briefly stated, is that this Kentucky statute violates the provisions of the Fourteenth Amendment of the Federal Constitution in that it makes an unreasonable discrimination. The constitutionality of this statute has been upheld by the Supreme Court of the State of Kentucky.

Graham v. *McGann Lumber Co.*, 118 Ky., 192.

The constitutionality of a similar statute, almost identical in its terms, has been upheld by the highest court of the State of Virginia.

Virginia Developing Co. v. *Crozier Iron Co. et al*, 90 Va., 126.

The constitutionality of similar statutes has been upheld by the courts of Indiana, Tennessee and Florida.

Warren et al v. *Sohn et al*, 112 Ind., 213.
Gilbert Parks & Co. v. *Thos. Parks & Co.*, 12 Heisk (Tenn.), 633.
Jacob Summerlin et al v. *Thompson & Co.*, 31 Fla., 365.

These authorities show conclusively that there has been no conflict between this Court of Appeals and the highest court of the State of Kentucky or any other state, nor between this Court of Appeals and other courts of appeal, on this question. In view of this there is no reason why your honorable court should grant this writ.

The rule is well settled that the equal protection clause of the Fourteenth Amendment does not take from the states the power to classify the subjects of legislation, but leaves to the Legislature a wide field of discretion in that regard, avoiding such classification only when unreasonable and arbitrary; and that a legislative classification is presumed to be reasonable unless it is apparent that there was and could be no reasonable basis therefor.

Lindsley v. *Natl. Carbonic Gas Co.*, 220 U. S., 61.
Jeffrey Mfg. Co. v. *Blagg*, 235 U. S., 571.
Magoun v. *Illinois Trust & Savings Bank*, 170 U. S., 283.
Orient Insurance Co. v. *Robt. E. Daggs*, 172 U. S., 557.
Barrett v. *Indiana*, 229 U. S., 26.
Singer Sewing Machine Co. v. *Brickell*, 233 U. S., 304.
L. & N. R. R. Co. v. *Melton*, 218 U. S., 36.
Easterling Lumber Co. v. *Pierce*, 235 U. S., 380.
Aluminum Co. v. *Ramsey*, 222 U. S., 251.

The reason underlying such legislation, as the statute in question, is exactly the same as the reason underlying legislation creating a mechanic's lien. Mechanic's lien statutes have been held constitutional, as will be conceded

by the petitioners (*Gulf, etc., Ry. Co.* v. *Ellis*, 165 U. S., 150). The lien herein as will be noted, is given to those whose work, labor, or materials create the product of the manufacturer and in that way become component parts of such product, which naturally enhance its value and the value of the manufacturer as a going concern.

There is nothing arbitrary or unreasonable in preferring material men and employes, whose supplies and labor enter into the marketed product, over sellers of machinery or other similar goods upon which liens for the purchase price may be well preserved, or over those loaning money who are generally in a position to exact personal security or endorsement. The petitioners must have had knowledge of the existence of this law at the time they loaned their money to the bankrupt, as this statute was in existence at that time and for many years prior thereto. They made the loan of money without securing ample protection at their own risk (*Provident Institution, etc.*, v. *Jersey City*, 113 U. S., 527). Furthermore, there is nothing arbitrary or unreasonable in preferring material men who furnish supplies to a manufacturer over one who furnishes supplies to a dealer, because in the former case such supplies become component parts of the product itself, which does not obtain in the case of a dealer. The cases cited by the petitioners have no bearing upon the instant case, as they involve facts entirely different from the facts in the case at bar.

It is not incumbent upon the court to grant this writ merely because the constitutionality of a statute is involved.

Carey Mfg. Co. v. *Acme Clasp Co.*, 187 U. S., 427.

Robinson v. *Caldwell*, 165 U. S., 359.

American Sugar Refining Co. v. *New Orleans*, 181 U. S., 277.
Huguley Mfg. Co. v. *Galeton Cotton Mills*, 184 U. S., 290.

At the most, a constitutional question merely gives the right to review by appeal or writ of error.

II.

This Kentucky Statute is Not in Conflict With the Bankruptcy Act.

The petitioners, as their second reason why your honorable court should grant this writ, contend that the statute allowing such liens is contrary to and in conflict with the United States Bankruptcy Act of July 1, 1898, and the amendments thereto. This question has been frequently decided by various courts of the United States, and they are uniform in holding that such a statute in no way contravenes the bankruptcy act.

In the case of

In Re Bennett, 513 Fed. Rep., 673,

the Circuit Court of Appeals of the Sixth Circuit definitely passed on this question with reference to this identical statute. The late Mr. Justice Lurton as Circuit Judge of that court, prepared the opinion in which the court held that this statute does not in any way contravene the bankruptcy act. The court stated that this was the view which had been taken by many careful judges and cited numerous authorities in support of such statement.

In Re Wright, 95 Fed., 807.
In Re Crow, 116 Fed., 110.

In Re Falls City Shirt Mfg. Co., 98 Fed., 592.
In Re Daniels, 110 Fed., 745.
In Re Byrne, 97 Fed., 762.
In Re Goldberg Bros., 144 Fed., 566.
In Re Laird, 109 Fed., 550.

This very question was presented to the District Court for the Eastern District of Kentucky with reference to this same statute, and that court came to the same conclusion.

In Re Lynn Camp Coal Co., 168 Fed., 998.

The same question was also decided by the District Court for the Eastern District of Virginia with reference to a statute almost identical with the one at bar.

In Re Norfolk Lumber Co., 112 Fed., 759.

We know of no case which has held to the contrary, and the petitioners have cited none in their briefs. We respectfully submit that there is such uniformity of decision on this point as would justify this court in refusing to grant this application.

III.

The Decision of the Court of Appeals Should Not be Reviewed Because it Defines How Such Statute Should be Construed.

The petitioners further contend that this court should exercise its power of granting *certiorari* because the Circuit Court of Appeals, in its opinion, differed from the petitioners' contention that the statute herein should be strictly construed against those claiming the benefit of the lien. It is not pointed out why this honorable court

should burden itself with a review of this case for such reason. Such an argument does not involve questions of public or national importance, nor does it involve a conflict with the decisions of other courts of appeal or between courts of appeal and courts of a state. The only reason assigned is that there is a conflict in some cases as to how lien statutes are to be construed. If such a reason is sufficient for this honorable court to burden itself with a review of this case, then nine-tenths of the cases could be brought to this tribunal for review, as few cases are litigated where there is not some difference of authority. Furthermore, the court below did not base its decision only on the ground that a liberal construction should be given to such statute, but particularly stated that apart from such questions of construction the lien claimants came within the provisions of this statute.

Statutes of the nature of this Kentucky lien law belong to the general class of remedial statutes; and while the courts were at one time inclined to hold that such statutes, being in derogation of the common law, must always be strictly construed, there has been a noticeable relaxation in favor of a more liberal construction for the purpose of effecting the beneficent purposes of such legislation. The federal safety appliance act is, in this view, liberally construed.

> *Johnson* v. *So. Pac. Ry. Co.*, 196 U. S., 1, 17.
> *Schlemmer* v. *Buffalo, etc., Ry. Co.*, 205 U. S., 1.
> *Southern Ry. Co.* v. *Snyder*, 187 Fed., 492, 495.

A statute giving a lien is regarded as a remedial statute, and is to be liberally construed so as to give full effect to the remedy in view of the beneficial purpose contemplated by it.

1 Jones on Liens, Section 1005.
Smalley v. *Terra Cotta Co.*, 113 Mich., 141.
DeWitt v. *Smith*, 63 Mo., 263.
Maynard v. *Ivey*, 21 Nevada, 241.
Bullock v. *Horn*, 44 O. S., 420.
Godfrey Lumber Co. v. *Klein*, 167 Mich., 629.

There are many other authorities in support of such construction of a statute of this kind which we do not think necessary to cite at this time.

IV.

The Decision of the Court of Appeals Does Not Depart From This Court's Definition of "Manufacturing" Nor Does it Conflict With Judicial Interpretations of a Term of Growing Importance in Modern Legislation.

It has been decided definitely by the learned district and circuit judges that the bankrupt herein was engaged in the business of manufacturing.

In Re The I. Rheinstrom & Sons Co., 207 Fed., 119 (Judge Cochran's opinion).
In Re The I. Rheinstrom & Sons Co. (Court of Appeals opinion, Record, page ——).

That the business of the bankrupt conforms to the definition of manufacturing establishments, as laid down by the decisions of this honorable court, is shown positively by the great weight of authority in addition to the decisions in the District Court and the Court of Appeals. It is not proper that arguments on the merits should be advanced on a motion of this kind, and as we understand the rule, the petitioners should confine themselves to rea-

sons why this motion should be granted as clearly defined by this court in the cases heretofore cited.

The bankrupt was engaged in producing a product that was distinctive in character and use from a cherry in its original state. The pitting, stemming, coloring, sweeting, cooking, and flavoring to which the natural cherries were subjected by the bankrupt—a process which lasted six days and which required the use of a large factory and complicated machinery—produced an article entirely distinctive in name, character, and use. It had parts which the natural cherries did not have; it served a purpose which the natural cherry did not serve. By the bankrupt's treatment it has been given qualities and parts which enabled it to meet a demand which the natural cherry did not and could not meet. The bankrupt was the efficient cause of bringing about the existence of an article which otherwise would not exist. The finished cherry was of a different color, different taste, was composed of different ingredients, and served a different purpose from the cherry in its raw and natural state.

That this is manufacturing is established

First. By the cases that are truly analogous and directly in point:

In Re Alaska American Fish Co., 162 Fed., 498.
Engel v. *Sohn & Co.*, 41 O. S., 694.
State v. *American Sugar Ref. Co.*, 108 La., 603.
Commonwealth v. *Salt Co.*, 1 Dauph. Co. (Pa.), 97.
Commonwealth v. *Excelsior Brick & Stone Co.*, 535, June Term, 1893 (Pa.).

See also the opinion in the case of

Commonwealth v. *Dressed Beef Co.*, 88 Atlanta Rep., 975 (Supreme Court of Pa., 1913).

SECOND. By the Kentucky cases deciding what is manufacturing under this statute:

Graham v. *McGann Lumber Co.*, 118 Ky., 192.
Hall & Son v. *Guthrie, Assignee*, 31 Ky. L. R., 901.
Winters v. *Howells, Assignee*, 109 Ky., 165.
Bogard v. *Tyler, Admr.*, 21 Ky. L. R., 1452.
In Re Floyd & Bohr Co., 200 Fed., 1016.
In Re Bennett, 153 Fed., 673.
In Re Stark-Ullmann Saddlery Co., 171 Fed., 834.

THIRD. By cases from other jurisdictions:

Hartranft v. *Wiegmann*, 121 U. S., 609.
Schriefer v. *Wood*, 21 Fed. Cases, 737.
Attorney-General v. *Lohrman*, 59 Mich., 157.
State v. *Wilbert Co.*, 51 La. Ann., 1223.
United States v. *Hathaway*, 4 Wall., 404.
United States v. *Quimby*, 4 Wall., 408.
Wood Co. v. *Roberts*, 47 N. Y. Supp., 122.
Louisiana v. *Biscuit Co.*, 47 La. Ann., 160.
Johnson v. *Sommerville Co.*, 15 Gray (Mass.), 216.
Railroad Co. v. *Fulgham*, 91 Ala., 555.
Haas v. *Petroleum Co.*, 101 Mass., 382.
In Re Irwin, 62 Fed., 150.
In Re Gardner, 72 Fed., 494.
New Orleans v. *Ernst*, 35 La. Ann., 747.
United States v. *Kaufman*, 84 Fed., 446.
East Saginaw Salt Mfg. Co. v. *Saginaw Salt Co.*, 13 Wall., 373.
Central Ohio Co. v. *Guthrie*, 35 O. S., 666.
People v. *Morgan*, 61 App. Div. (N. Y.), 373.
People v. *Wemple*, 129 N. Y., 543.
Murphy v. *Arnson*, 96 U. S., 131.

V.

The Decision of the Court of Appeals Should Not Be Reviewed Because it Does Not Violate the Rule of "Ejusdem Generis" in Statutory Construction.

The Court of Appeals did not violate the maxim of "*ejusdem generis.*" Such maxim is merely a rule of construction and need not necessarily be applied in ascertaining the legislative intent if some other rule of construction makes the meaning of a statute clear and certain. A court is not therefore required to arbitrarily apply such rule merely because there is a general term following a specific term. It has been repeatedly held that such rule is a mere suggestion to the judicial mind; that the law-maker was probably thinking of the particular class of persons enumerated to which his words of more general description should be confined. This rule, however, gives way to the cardinal and primary rule of construction that the words of a statute should be given their ordinary meaning and that no words or phrase should be denied its known or natural meaning. In view of this, if the application of this primary rule or any other rule of construction makes the meaning of the statute clear and certain, the court did not err in holding that this maxim of "*ejusdem generis*" did not apply.

Black on Statutory Construction, 143.
Sutherland on Statutory Construction, 832.
State v. *Woodman*, 26 Mont., 348 (1901).
State v. *Solomon*, 33 Ind., 450.
Gillock v. *State*, 171 Ill., 307.
Mitchell v. *Town of Plover*, 53 Wis., 548.
County of Union v. *Ussery et al*, 147 Ill., 204.

Willis v. *Mahon*, 48 Minn., 140.
Hilton's Appeal, 116 Pa. St., 351.
Woodworth v. *State of Ohio*, 26 O. S., 196.
Foster v. *Blunt*, 18 Ala., 687.
Randolph v. *State*, 9 Texas, 521.
State v. *Holman*, 3 McCord (S. C.), 306.
Dodgett v. *Cotterus*, 17 O.C.C.(N.S.), 669.

Furthermore, the doctrine of "*ejusdem generis*" has no application when the intent of the legislature is otherwise clearly shown. This intent is shown:

1st. By the context of the statute itself.

2d. By the contemporaneous acts of the Legislature.

1. By the Context of the Statute Itself.

(*a*) There is a conclusive consideration against limiting the statute to establishments similar to that of a rolling mill or foundry. The cases which are cited by the petitioners, which apply the rule of "*ejusdem generis*," recognize that it should not be applied where there is something in the context against this application. There is something in the context in the statute at bar which shows beyond question that it was the thought of the Legislature to include all manufacturing establishments. We refer to the word "manufacturing" which was advisedly used to distinguish manufacturing establishments from those specifically enumerated. It qualifies a general clause so as to show beyond doubt that the Legislature had in mind establishments other than rolling mills or foundries. The cases cited by the petitioners have no similar word qualifying a general clause with the exception of *Newport News, etc., Co.* v. *United States* (61 Fed., 488). In this case the court gives a definite meaning to the qualifying words which makes such case an authority in support of our position rather than an authority to the contrary.

(*b*) By the title of the act itself, to-wit "*Railroads, other improvements and manufacturies—liens of employees and others on.*

3rd Article, Chapter 79 Kentucky Revised Statutes.

2. By the Contemporaneous Acts of the Legislature.

On March 20, 1876, the day when this statute was enacted, the Legislature enacted another act which provided for the establishment of a bureau for the promotion of manufacturies in the state. By such contemporaneous acts it is shown that the Legislature had in mind the advancement of manufacturing interests. It is therefore reasonable to believe that in order to encourage and promote such manufacturing interests, the Legislature intended that this lien should be given to the employees and material men of manufacturing establishments as well as those establishments particularly enumerated. The contemporaneous act referred to is reported in

Acts of Kentucky, Vol. 1, 1875-6, page 126.

* * * * *

Furthermore, the courts of the State of Kentucky, the federal courts of both districts of this state, and this Court of Appeals have decided that the terms of this statute are applicable to all manufacturing corporations and have not confined it to establishments of a nature similar to a rolling mill or foundry. In this respect the courts are in perfect harmony, as will be seen by the following authorities, to-wit:

Winter v. *Howell*, 109 Ky., 163.
(An establishment where mixed paints and cutoffs for cisterns were made.)

Bogard v. *Tyler*, 21 Ky. Rep., 1452.
(A saw mill.)
Graham v. *McGann Lumber Co.*, 118 Ky., 192.
(A saw mill.)
Hall & Son v. *Guthrie, Assignees*, 31 Ky. L. R., 901.
(A flour mill.)
In re Stark-Ullmann Saddlery Co., 171 Fed., 834.
(Horse leather factory.)
In Re Bennett, 153 Fed. Rep., 673.
(A panel factory.)
In Re Falls City Shirt Mfg. Co., 98 Fed. Rep., 592.
(A shirt manufactory.)
In Re Floyd & Bohr Co., 200 Fed. Rep., 1016.
(Hardware and saddlery company.)

In the cases of *Winter* v. *Howell*, *Bogard* v. *Tyler*, and *In Re Stark-Ullmann Saddlery Company*, the lien claimed under this statute was denied, but it was not denied on the ground that the establishment in question was not a manufacturing establishment within the meaning of the statute. In the case of *Muir* v. *Samuels* (110 Ky., 605) the lien was denied on the ground that a laundry was not a manufacturing establishment, and not on the ground that it was not an iron manufactory.

VI.

The Decision of the Court of Appeals Does Not Hold That a Decision is a Precedent Upon a Point Not Raised or Presented.

The Court of Appeals and the District Court both decided that the contention of the petitioners that the statute relates to manufacturing establishments only of the

class of rolling mills and foundries, must be regarded as foreclosed by the repeated decisions of the highest court of the State of Kentucky and the Court of Appeals of the Sixth Circuit extending over a period of years. (See the Kentucky cases heretofore cited.) The petitioners argue, however, that they should not be foreclosed because these courts, in construing this statute, failed to apply the maxim of "*ejusdem generis.*" They base their contention upon the fallacy that the rule of *ejusdem generis* is an arbitrary rule which must be invoked by a court in construing a statute. Such rule is merely one rule of construction which the court can apply if the court fails to arrive at the legislative intent by the application of any other rule. It is true that in none of these cases cited was the doctrine of *ejusdem generis* referred to; but as each of these courts was compelled to construe the statute so as to make it applicable to the respective establishment, some rule of construction must have been invoked to determine the legislative intent of such statute. If the petitioners are correct, then we can say without hesitation that the majority of adjudicated cases leave the questions there involved open, because all rules of law for the determination of such questions, were not advanced and submitted to the court. The mere fact that the courts have not invoked this one rule of construction, does not make the question whether this statute is limited to rolling mills or foundries and establishments of a similar nature, an open one, when the courts have repeatedly decided, by invoking other rules of construction, that the statute refers to all manufacturing establishments of any kind whatsoever.

CONCLUSION.

In conclusion we again refer to the fact that there has been no conflict between this Court of Appeals and other Courts of Appeal, or between this Court of Appeals and the highest court of the State of Kentucky or any other state, on any of the questions here involved. On the contrary, the decision of this Court of Appeals has been in perfect harmony with all other decisions. Furthermore, none of these questions affect the interests of this action in its internal or external relations so as to demand a review by this Court. Nor are the questions here involved of such deep gravity and general importance as to warrant this court in departing from its well-defined rule that the exercise of the power of *certiorari* should be sparingly granted.

We respectfully submit that this motion should be overruled and that the writ of *certiorari* be denied.

Respectfully submitted,

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May 17, 1915.

CENTRAL TRUST COMPANY OF ILLINOIS, AND TRUSTEE OF RHEINSTROM, *v.* LUEDERS.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

No. 445. Motion to dismiss submitted October 12, 1915.—Decided October 25, 1915.

The provision in § 4 of the Act of January 28, 1915, c. 22, 38 Stat. 803, making judgments and decrees of the Circuit Courts of Appeals in bankruptcy proceedings final except on *certiorari* by this court, applies to all cases including those involving and requiring interpretation of state statutes and application of the Federal Constitution.
Appeal from 221 Fed. Rep. 829, dismissed.

THE facts, which involve the jurisdiction of this court of appeals in bankruptcy proceedings from the Circuit Court of Appeals under § 4 of the Act of January 28, 1915, are stated in the opinion.

Mr. Walter A. DeCamp, Mr. Dudley V. Sutphin, Mr. Leo J. Brumleve, Jr., Mr. Edward F. Peters and *Mr. Paul V. Connolly* for appellees, in support of the motion.

Mr. Lessing Rosenthal, Mr. Charles H. Hamill, Mr. Leo F. Wormser, Mr. Judson Harmon, Mr. Edward Colston, Mr. A. W. Goldsmith and *Mr. George Hoadly* for appellants, in opposition to the motion:

The jurisdiction of this court, conferred by § 241, Jud. Code (as construed in *Houghton* v. *Burden*, 228 U. S. 161, 165), has not been divested by the Amending Act of January 28, 1915.

Where an Act of Congress is directed to a class of cases which had so increased in number as to impose a burden of litigation upon this court, the Act will be given effect

in the light of the object of its enactment and will not be construed as a limitation upon the jurisdiction of this court in a case not belonging to that class, even though the operation of the Act must be restrained within narrower limits than its literal words import. *United States* v. *Am. Bell Tel. Co.*, 159 U. S. 548; *Petri* v. *Commercial Bank*, 142 U. S. 644, 650; *Holy Trinity Church* v. *United States*, 143 U. S. 457, 459; *United States* v. *Rabinowich*, 238 U. S. 78.

Where the correctness of a judgment of the Circuit Court of Appeals depends upon the construction or application of the Constitution of the United States, the defeated party, provided it has asserted its constitutional rights from the outset, is entitled, as of right, to a reexamination of the judgment by this court, even though the decree of the District Court was rendered sitting in bankruptcy. *Spreckels Sugar Co.* v. *McClain*, 192 U. S. 397.

Memorandum opinion by MR. JUSTICE MCREYNOLDS, by direction of the court.

The I. Rheinstrom & Sons Company was adjudged a bankrupt in April, 1912. Liens upon its property were claimed by appellees under a Kentucky statute which appellants (general creditors) maintained contravened the Fourteenth Amendment to the Constitution of the United States. Overruling the Referee, the District Court allowed the liens (207 Fed. Rep. 119) and this action was approved by the Circuit Court of Appeals, March 2, 1915, in an opinion which expressly upheld the validity of the statute (221 Fed. Rep. 829). Appellees have moved to dismiss the present appeal.

Section 4, Act of Congress, approved January 28, 1915, c. 22, 38 Stat. 803, 804, provides: "That the judgments and decrees of the circuit courts of appeals in all proceed-

ings and cases arising under the bankruptcy Act and in all controversies arising in such proceedings and cases shall be final, save only that it shall be competent for the Supreme Court to require by certiorari, upon the petition of any party thereto, that the proceeding, case, or controversy be certified to it for review and determination, with the same power and authority as if taken to that court by appeal or writ of error; but certiorari shall not be allowed in any such proceeding, case, or controversy unless the petition therefor is presented to the Supreme Court within three months from the date of such judgment or decree."

Manifestly, the words of the quoted section include the decree below and inhibit an appeal therefrom. It is argued, however, that they should be so construed as to exclude causes requiring interpretation of state statutes and application of the Federal Constitution and thereby limited in effect to the supposed purpose of Congress to relieve this court only from the necessity of reviewing bankruptcy cases which "involve complicated questions of fact rather than of law." We see no reason to doubt that the plain language of the enactment aptly expresses the fixed legislative intent. The appeal is accordingly

Dismissed for want of jurisdiction.